TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 89.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY AND MAYSVILLE & BIG SANDY RAILROAD COMPANY, PLAINTIFFS IN ERROR,

vs.

EMMA R. McCABE, ADMINISTRATRIX OF PETER McCABE, DECEASED.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

FILED MAY 17, 1907.

(20,722.)

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1 COMMONWEALTH OF KENTUCKY:

The Court of Appeals.

Pleas Before the Honorable the Court of Appeals of Kentucky, at the Capitol, at Frankfort, on March the 7th, A. D. 1902.

EMMA R. MCCABE, as Adm'r'x of Peter McCabe, Deceased, Appellant,
vs.
MAYSVILLE & BIG SANDY R. R. Co., Appellee.

Appeal from Mason Circuit Court.

Be it remembered that on the 17th day of December, 1901, the appellant by her attorney filed in the office of the Clerk of the Court of Appeals a transcript of the record, which is in words and figures as follows:

2 STATE OF KENTUCKY:

Mason Circuit Court.

Pleas Had Before the Honorable James P. Harbeson, Judge of the Mason Circuit Court, at the Court-house Thereof, in the City of Maysville, on the 11th Day of December, 1901.

Mason Circuit Court.

EMMA R. MCCABE, as Administratrix of Peter McCabe, Deceased, Plaintiff,
against
MAYSVILLE & BIG SANDY RAILROAD CO. and CHESAPEAKE & OHIO RAILWAY CO., Defendant-.

Petition.

3 Be it remembered that heretofore, to-wit: On the 27th day of September, 1901, the plaintiff, by her attorneys, A. E. Cole & Son, filed in the Clerk's Office of this Court, her certain petition herein, in words and figures following, to-wit:

Petition.

Par. 1. The plaintiff, Emma R. McCabe, states that, on the 21st day of Sept., 1901, Peter McCabe died a citizen and resident of Maysville, Mason Co., Ky., and on Sept. 24", 1901, she was, by order of the Mason County Court, appointed administratrix of his estate, and thereupon, qualified and is now acting as such administratrix: copies

of the orders showing the appointment and qualification are filed as part hereof, marked "A".

That the defendant, Maysville & Big Sandy Railroad Co., is and was, at all times hereinafter stated, a corporation created, organized and existing under the laws of the State of Kentucky, having been given, in its charter, general powers of eminent domain and
4 owns a railroad extending from the City of Covington, Ky., to the Western limits of the City of Maysville, along the Ohio river, to the City of Ashland, Boyd Co., Ky., but passing in its course through the City of Maysville, Mason Co., Ky.

That on the — day of ——, 18—, the Board of Council of the City of Maysville, by an ordinance then adopted, undertook to authorize the defendant, Maysville & Big Sandy Railroad Co., perpetually to use certain alleys and streets in said city therein named, to construct its road across or along such streets as it might find expedient to use, as aforesaid, and to occupy so much thereof as may be necessary for the construction of its track, as aforesaid; which ordinance plaintiff avers was and is *ultra vires*, null and void.

That in pursuance of said ordinance, the defendant, Maysville & Big Sandy Railroad Co., did take possession of and permanently appropriate longitudinally to its use about one-half mile or
5 more of Third St., in said city, which appropriation of said street plaintiff avers was *ultra vires*, null and void; and that said ordinance so adopted by the City of Maysville, as aforesaid, contained a provision that the franchise, so attempted to be granted, should be of no effect, if, at any time or whenever the defendant, its agents or employés, should run its locomotive and train of cars through said City at a greater rate of speed than six miles an hour; which condition the defendant, Maysville & Big Sandy Railroad Co., its agents and employés, did, at the time of the injuries to plaintiff's intestate, and on divers other days before and since then, break in that at all times herein mentioned locomotives and trains of cars were run by defendant, its agents and employés, on its said track through the City of Maysville at a greater rate of speed than six miles an hour, by reason whereof defendant's track, through said City and the cars run thereon are and were, at all times herein mentioned, a purpresture and nuisance; that at the time the Board
6 of Council of the City of Maysville undertook to grant said franchise to the defendant, Maysville & Big Sandy Railroad Co., it also enacted an ordinance making it unlawful for any Railroad or Railway Co., its agents and servants, to operate or run a locomotive or train of cars upon or through any of the streets of said City at a greater rate of speed than six miles an hour; which ordinance stands unrepealed and is in full force and effect. That after the building and completion of its road and more than twelve months before the injuries to plaintiff's intestate, the defendant, Maysville & Big Sandy Railroad Co., leased and transferred its entire line of road extending from Ashland, Ky. to Covington, Ky., together with the use of the franchise so granted to it, as aforesaid, by the Board of Council of the City of Maysville, to its co-defendant, Chesapeake & Ohio Railway Co., which latter Company has ever since then, and

still is, in the exclusive possession and control thereof and controlling and operating trains of cars thereon and was so in possession
7 at the time of the injuries herein complained of; and that under the laws of Kentucky said lease and transfer was and is illegal, *ultra vires* and void.

Plaintiff states that on the — day of —— 1893, pursuant to Section 211 of the Constitution of Kentucky and Section 841, Kentucky Statutes, the defendant, Chesapeake & Ohio Railway Co., became a corporation, citizen and resident of this State by filing in the office of the Secretary of State and in the office of the Railroad Commission copies of the charters or articles of incorporation of the Chesapeake & Ohio Railway Co., organized under the laws of Virginia and West Virginia, authenticated by its seal, and by the attestation of its President and Secretary, by virtue whereof defendant, Chesapeake & Ohio Railway Co., at once became and is now a corporation, citizen and resident of this State, and that, thereupon, a certificate of said incorporation was issued to said defendant by the Secretary of
8 State. That while her intestate, Peter McCabe, was walking along Third St., in said City, in a short distance from public crossings both east and west of him, which crossings crossed the track of the defendant, Maysville & Big Sandy Railroad Co., in said City, he, the said Peter McCabe, being in plain view of the conductor, engineer, and fireman, employés of said Chesapeake & Ohio Railroad Co., on the engine and locomotive and train operated by said defendant, its agents and servants, as aforesaid, was on the — day of Sept. 1901, without fault on his part, wilfully, wantonly, carelessly and negligently run against and struck by said locomotive and train of cars of the defendant, Chesapeake & Ohio Railway Co., operated as aforesaid, causing injuries from which he died; that said locomotive and train of cars, operated as aforesaid, were then and there being run over and upon said Third St. in violation of said ordinance at a greater rate of speed than six miles an hour; that the defendant, Chesapeake & Ohio Railway Co., its agents and servants, saw, or by the exercise of ordinary care and reasonable diligence, could have seen him in time to have prevented his death.

9 Plaintiff states that the injuries herein complained were sustained by her intestate both by reason of the negligence of the defendant, Maysville & Big Sandy Railroad Co., in suffering its co-defendant, Chesapeake & Ohio Railway Co., its agents and servants, to operate its locomotive engine and train of cars on its track, as aforesaid, and by reason of the negligence of the defendant, Chesapeake & Ohio Railway Co., its agents and servants, who were in charge of said train; that the injuries to her intestate would not have been inflicted upon him but for the carelessness and negligence of the defendants, Maysville & Big Sandy Railroad Co., and Chesapeake & Ohio Railway Co., their agents and servants, as aforesaid, and that by reason of the killing of her intestate, which was done by the negligence of the defendants, their agents and servants, as aforesaid, his estate has been damaged in the sum of $25000.00.

Wherefore, the plaintiff, Emma R. McCabe, as administratrix of

Peter McCabe, deceased, prays judgment against the defend-
10 ants, Maysville & Big Sandy Railroad Co., and Chesapeake & Ohio Railway Co., in the sum of $25000.00, for her costs and for all proper relief.

A. E. COLE & SON,
Attorneys for Plaintiff.

Summons.

The Commonwealth of Kentucky to the Sheriff of Mason County, Greeting:

You are commanded to summon Maysville and Big Sandy Railroad Co., and Chesapeake and Ohio Railway Co., to answer on the first day of the next November term of the Mason Circuit Court a petition filed against them in said Court, by Emma R. McCabe, as Administratrix of Peter McCabe, deceased, and warn them that upon their failure to answer, the petition will be taken for confessed or they will be proceeded against for contempt; and you will make due return of this summons, on the first day of the next November term of said Court.

11 Witness, Isaac Woodward, Clerk of said Court, this 27 day of September, 1901.

ISAAC WOODWARD, *Clerk.*

Sheriff's Return.

Executed on the Maysville and Big Sandy Railroad Company and the Chesapeake and Ohio Railway Company Oct. 2, 1901, at Maysville, Ky., by delivering to W. H. Wadsworth a true copy of the within summons; he being the agent designated by it in the statement filed by it in the office of the Secretary of the State, upon whom process against can be served.

S. P. PERRINE, *S. M. C.*,
By JAS. MACKEY, *D. S.*

(Following is an amended petition filed in the Clerk's office, Oct. 7th, 1901.)

Amended Petition.

Mason Circuit Court.

12 EMMA R. MCCABE, as Administratrix of Peter McCabe, Deceased, Plaintiff,
vs.
MAYSVILLE & BIG SANDY RAILROAD CO., etc., Defendants.

Amended Petition.

Par. 1. Now comes the plaintiff, Emma R. McCabe, before answer filed and amends her petition herein and for amendment states that

the defendant, Chesapeake & Ohio Railway Co., uses its cars and locomotives within the limits of the City of Maysville and operates the same across and along streets of said city upon divers railway tracks constructed thereon among others along said Third St., which is and was at all times herein mentioned a public street, highway and thoroughfare of said city dedicated to the use of its citizens long before the City of Maysville attempted to grant said franchise to the Maysville & Big Sandy Railroad Co., that the defendant,

13 Maysville & Big Sandy Railroad Co., constructed and laid a double track along said Third St., and thus longitudinally and permanently appropropriated the whole of said street to its use throughout its entire length in the Fifth Ward of said City and thus rendered the same unfit to be travelled over and upon by wagons and vehicles, although the same is now and was at all times herein mentioned frequently and commonly used for foot travel by a large number of pedestrians in and about said city; which fact was well known to defendants at the time of the injuries herein complained of.

Plaintiff states that at the time aforesaid while her intestate, the said Peter McCabe, was walking along said street, as he lawfully might do, between Poplar and Commerce Streets at or near the place known as the Commerce Street crossing, defendant, Chesapeake & Ohio Railway Co., in an unlawful manner caused one of its locomotives and train of cars to be run and conducted along and over said Third St., and at or near said crossing in so negligent, careless

14 and reckless a manner as, without fault on his part, to strike and inflict upon her intestate the injuries herein complained of.

Plaintiff further states that no bell was rung on said locomotive or train of cars while running over said public street, as was required by proper and prudent management, and that said train was permitted to run along said street at a reckless and excessive speed, to-wit, 40 miles an hour, and without giving any signal or warning of its approach. Plaintiff states that by reason of the neglectful, careless and unlawful conduct of defendants in running said locomotive and cars against her intestate, as aforesaid, he sustained great external and internal injuries, as a consequence whereof he died, to the damage of his estate in the sum of $25000.00.

Wherefore, Plaintiff prays judgment for $25000.00 and all proper relief.

A. E. COLE & SON,
Att'ys for Plaintiff.

15 (Following is an amended petition filed in the Clerk's Office Nov. 4th, 1901.)

Amended Petition.

Mason Circuit Court.

EMMA R. MCCABE, as Administratrix of Peter McCabe, Deceased, Plaintiff,

vs.

MAYSVILLE & BIG SANDY RAILROAD CO. and CHESAPEAKE & OHIO RAILWAY CO., Defendants.

Amended Petition.

Par. 2. Now comes the plaintiff, Emma R. McCabe, before answer filed, and for amendment to her petition states, that either the facts in the foregoing paragraph are true, or those in this are true, but she does not know which are true: That on the 21st day of Sept., 1901, Peter McCabe died a citizen and resident of Maysville, Mason
16 Co., Ky., and on Sept. 24, 1901, she was, by order of the Mason County Court, appointed administratrix of his estate and thereupon qualified and is now acting as such administratrix: copies of the orders showing the appointment and qualification are filed as part hereof, marked "A."

That the defendant, Maysville & Big Sandy Railroad Co. is and was at all times hereinafter stated a corporation created, organized and existing under the laws of the State of Kentucky, having been given in its charter general powers of eminent domain and owns a railroad extending from the city of Covington, Ky., to the western limits of the City of Maysville; thence from the eastern limits of the city of Maysville along the Ohio River to the City of Ashland, Boyd Co., Ky., but passing in its course through the City of Maysville, Mason Co., Ky. That on the — day of ——, 18— the board of Council of the City of Maysville by an ordinance then adopted undertook to authorize the defendant, Maysville & Big Sandy
17 Railroad Co., perpetually to use certain alleys and streets in said city therein named, to construct its road across or along such streets as it might find expedient to use, as aforesaid, and to occupy so much thereof, as may be necessary for the construction of its track, as aforesaid; which ordinance plaintiff avers was and is *ultra vires*, null and void. That in pursuance of said ordinance the defendant, Maysville & Big Sandy Railroad Co., did take possession of and permanently appropriate longitudinally to its use about one-half mile or more of Third St. in said city, which appropriation of said street plaintiff avers was *ultra vires*, null and void; and that said ordinance so adopted by the City of Maysville, as aforesaid, contained a provision that the franchise so attempted to be granted should be of no effect if at any time or whenever the defendant, its agents or employés, should run its locomotive and train of cars through said city at a greater rate of speed than six miles an hour; which condition the defendant, Maysville & Big

Sandy Railroad Co., its agents and employés, did, at the
18 time of the injuries to plaintiff's intestate and on divers other days before and since then, break in that at all times herein mentioned locomotives and trains of cars run by defendant, its agents and employés, on its said track through the City of Maysville at a greater rate of speed than six miles an hour; which ordinance stands unrepealed and is in full force and effect. That after the building and completion of its road and more than twelve months before the injuries to plaintiff's intestate, the defendant, Maysville & Big Sandy Railroad Co., leased and transferred its entire line of road extending from Ashland, Ky., to Covington, Ky., together with the use of the franchise so granted to it, as aforesaid, by the Board of Council of the City of Maysville, to its co-defendant, Chesapeake & Ohio Railway Co., which latter Company has ever since then and still is in the exclusive possession and control thereof and controlling and operating trains of cars thereon and was so in possession at the time of the injuries herein complained of; and that under the
19 laws of Kentucky said lease and transfer was and is illegal, *ultra vires* and void.

Plaintiff states that on the — day of December, 1893, pursuant to Sec. 211 of the Constitution of Kentucky and Sec. 841, Kentucky Statutes, the defendant, Chesapeake & Ohio Railway Co., became a corporation, citizen and resident of this State by filing in the office of the Secretary of State and in the office of the Railroad Commission copies of the charters or articles of incorporation of the Chesapeake & Ohio Railway Co., organized under the laws of Virginia and West Virginia, authenticated by its seal and by the attestation of its President and Secretary, by virtue whereof defendant, Chesapeake & Ohio Railway Co., at once became and is now a corporation, citizen and resident of this State, and that thereupon a certificate of said incorporation was issued to said defendant by the Secretary of State.

That the defendant, Chesapeake & Ohio Railway Co., uses its cars and locomotive engines within the limits of the City of
20 Maysville and operates the same across and along the streets of said city upon divers railway tracks constructed thereon among others along said Third St., which is and was at all times herein mentioned a public street, highway and thoroughfare of said city dedicated to the use of its citizens long before the City of Maysville attempted to grant said franchise to the Maysville & Big Sandy Railroad Co.; that the defendant, Maysville & Big Sandy Railroad Co., constructed and laid a double track along said Third St., and thus longitudinally and permanently appropriated the whole of said street to its use, throughout its entire length in the Fifth Ward of said City and thus rendered the same unfit to be traveled over and upon by wagons and vehicles, although the same is now and was at all times herein mentioned frequently and commonly used for foot travel by a large number of pedestrians; which fact was well known to defendants at all times herein mentioned. That while her testate, Peter McCabe, was walking along said Third St., in said city, at or near where the track of the defendants, Maysville

& Big Sandy Railway Co., crosses Commerce St. in said city,
21 the same being a public crossing, while he was in plain view of the conductor, engineer, fireman and employés of the said Chesapeake & Ohio Railway Co., on the locomotive engine and train of cars operated by said defendant, its agents and servants, he, the said Peter McCabe, was on the — day of Sept., 1901, without fault on his part, with force and arms wrongfully, knowingly, and intentionally run against and struck by said locomotive and train of cars of the defendant, Chesapeake & Ohio Railway Co., operated as aforesaid; causing injuries and wounds from which he died; that the defendants, Chesapeake & Ohio Railway Co., its agents and employés, were then and there trespassers as aforesaid; that said defendants, Chesapeake & Ohio Railway Co., its agents and servants, wrongfully, knowingly, and intentionally operated and run said locomotive engine and train of cars at the reckless and excessive rate of speed, to wit, forty miles an hour, contrary to its contract with and said ordinance of the city of Maysville; that said defendants,
22 Chesapeake & Ohio Railway Co., its agents and servants, wrongfully, knowingly, and intentionally failed and refused to ring a bell or give any warning or signal of the approach of the locomotive engine and train of cars, which struck her intestate as aforesaid.

Plaintiff states that the death of her husband and intestate, Peter McCabe, there caused by the wrongful acts of the defendants, their agents and servants, by the means and in the manner aforesaid, and that their said acts were wilful; by reason herein of his estate has been damaged in the sum of $25,000.00.

Wherefore, the plaintiff, Emma R. McCabe, prays the judgment against the defendants in the sum of $25,000. and all proper relief.

A. E. COLE & SON,
Attorneys for Plaintiff.

Summons.

The Commonwealth of Kentucky to the Sheriff of Mason County, Greeting:

23 You are commanded to summon Maysville & Big Sandy Railroad Co., and Chesapeake & Ohio Railway Co., to answer on the first day of the next November term of the Mason Circuit Court a petition and amended petition filed against them in said Court, by Emma McCabe, Administratrix of Peter McCabe, deceased, and warn them that upon their failure to answer, the petition will be taken for confessed or they will be proceeded against for contempt; and you will make due return of this summons on the first day of the next November term of said Court.

Witness, Isaac Woodward, Clerk of said Court, this 4" day of November, 1901.

ISAAC WOODWARD, *Clerk.*
By THOS. A. RESPESS, *D. C.*

Sheriff's Return.

Executed on the Maysville & Big Sandy and the Chesapeake and Ohio Railway Company Nov. 6", 1901, at Maysville, Ky., by
24 delivering to W. H. Wadsworth a true copy of the within summons, he being the agent designated by it in the statement filed by it in the office of the Secretary of State upon whom process against it can be served.

S. P. PERRINE, *S. M. C.*,
By JAS. MACKEY, *D. S.*

(At a Court begun and held for the Mason Circuit Court on the 11th day of December, 1901.)

Order Filing Petition for Removal.

The defendant produced its petition for the removal of this cause to the United States Circuit Court for the Eastern District of Kentucky, and offered to file the same, to which plaintiff objected, and the court, being advised, overruled the objection and ordered said petition to be filed; to which ruling plaintiff excepted.)

Petition for Removal.

Mason Circuit Court.

EMMA R. MCCABE, as Administratrix of Peter McCabe, Deceased, Plaintiff,
25 *vs.*
CHEAPEAKE & OHIO RAILWAY CO., & AL., Defendants

Petition for Removal of This Cause to United States Circuit Court for the Eastern District of Kentucky.

To the Honorable, the Circuit Court of Mason County, State of Kentucky:

Your petitioner, the Chesapeake and Ohio Railway Company, respectfully shows that it is one of the defendants in the above entitled suit, and that the matter and amount in dispute in the said suit, exclusive of interest and costs, exceeds the sum or value of $2,000.00; that the said suit is of a civil nature, and that there is in said suit a controversy which is wholly between citizens of different states, and which can be fully determined as between them, to-wit, a controversy between your said petitioner, the Chesapeake & Ohio Railway Company, who avers that it was at the time of the bringing of this suit and still is, a corporation created, organized and existing under and by virtue of the laws of the State
26 of Virginia, and a citizen of the State of Virginia, and of no other State; and the plaintiff, Emma R. McCabe, ad-

ministratrix of the estate of Peter McCabe, deceased, which administratrix, your petitioner avers, was at the time of the bringing of this suit, and still is, a citizen and resident of the State of Kentucky.

Your petitioner further shows that the said controversy, as heretofore stated, is of a civil nature, and is, whether your petitioner is liable to the said plaintiff for damages on account of the death of her intestate, Peter McCabe, alleged to have been caused by reason of the alleged negligence of petitioner, in operating a train of petitioner over the line of railroad of the co-defendant, Maysville & Big Sandy Railroad Company, leased to petitioner, by running the said train over plaintiff's said intestate whereby he was instantly killed, and that on account of said alleged negligence, your petitioner has damaged the estate of said intestate in the sum of $25,000.00.

27 Your petitioner further states and shows that the co-defendant, the Maysville & Big Sandy Railroad Company, is a citizen and resident of the State of Kentucky, and is not a necessary or proper party defendant to this action; that the said Maysville and Big Sandy Railroad Company was made a defendant to this action for the sole and single purpose of preventing a removal, by your petitioner, of this cause to the Circuit Court of the United States, for the Eastern District of Kentucky, and thereby unlawfully, wrongfully and fraudulently deprive your petitioner of the right conferred upon it by the Constitution and laws of the United States.

Your petitioner further states and shows that neither the original petition or amended petition herein, or either of them, states a cause of action against the Maysville and Big Sandy Railroad Company; that at the time of the making of the lease and contract referred to in the petition and amended petitions, said Maysville & Big Sandy Railroad Company had ample authority of law to make said lease and contract, and same were made under and in pursuance thereof, and your petitioner, at the time of the injury complained of,

28 and before and since has been in possession, and was then in possession under said contract of all of said Maysville and Big Sandy Railroad Company's road-bed, tracks and depots, and all its other railroad property in Kentucky, and was in entire control and occupation of same, and was operating same at said time and before and since entirely on its own account and in its own name. Your petitioner further states and shows that at the time of the bringing of this action, and the injury complained of, it was and is now entirely solvent, and it states that the co-defendant, Maysville and Big Sandy Railroad Company, was, at the time of the injury herein complained of, and before, and is now insolvent, all of which the plaintiff well knew at the time of the bringing of this suit.

Your petitioner further states and shows that the allegations of the original petition herein, as follows, to-wit:

"which ordinance plaintiff avers was and is *ultra vires*, null and void."

"That in pursuance of said ordinance the defendant, Mays-

29 ville and Big Sandy Railroad Co., did take possession of and permanently appropriate longitudinally to its use, about one-

half mile or more of Third Street in said city, which appropriation of said street plaintiff avers was *ultra vires*, null and void; and that said ordinance so adopted by the City of Maysville, as aforesaid, contained a provision that the franchise so attempted to be granted, should be of no effect if, at any time, or whenever the defendant, its agents or employés, should run its locomotive and train of cars through said city at a greater rate of speed than six miles an hour, which condition the defendant, Maysville & Big Sandy Railroad Co., its agents and employés, did, at the time of the injuries to plaintiff's intestate, and on divers other days before and since then, break in that at all times herein mentioned, locomotives and trains of cars run by defendant, its agents and employés, on its said track through the City of Maysville, at a greater rate of speed than six miles an hour, by reason whereof defendant's track through said city,
30 and the cars run thereon, are and were at all times herein mentioned a purpresture and nuisance."

"And that under the laws of Kentucky said lease and transfer was and is illegal, *ultra vires* and void."

"Plaintiff states that "on the — day of December, 1893, pursuant to Sec. 211, Constitution of Kentucky, Sec. 841 Kentucky Statutes, the defendant, Chesapeake & Ohio Railway Co., became a corporation, citizen and resident of this State by filing in the office of the Secretary of State, and in the office of the Railroad Commission, copies of the charters, articles of incorporation of the Chesapeake & Ohio Railway Co., organized under the laws of Virginia and West Virginia, authenticated by its seal and by the attestation of its President and Secretary, by virtue whereof, defendant, Chesapeake & Ohio Railway Co., at once became and is now a corporation, citizen and resident of this State, and that thereupon a certificate of said incorporation was issued to said defendant by the Secretary of State."

31 "That said locomotive and train of cars, operated as aforesaid, then and there being run over and upon said Third street in violation of said ordinance at a greater rate of speed than six miles an hour."

"Plaintiff states that the injuries herein complained were sustained by her intestate both by reason of the negligence of the defendants, Maysville and Big Sandy Railroad Co., in suffering its co-defendant, Chesapeake & Ohio Railway Co., its agents and servants, to operate its locomotive engine and train of cars on its track, as aforesaid, and by reason of the negligence of the defendant, Chesapeake and Ohio Railway Co., its agents and servants, who were in charge of said train; that the injuries to her intestate would not have been inflicted upon him but for the carelessness and negligence of the defendants, Maysville and Big Sandy Railroad Co., and Chesapeake and Ohio Railway Co., their agents and servants, as aforesaid; and that by reason of the killing of her intestate, which was done by the negligence of the defendants, their agents and servants, as aforesaid, his estate has been damaged in the sum of $25,000.00;"

32 are each and all of them untrue and palpably so, and were known to the plaintiff to be untrue when made in the petition.

Petitioner further states and shows that the allegations of the amended petition filed October 7", 1901, as follows, to-wit:

"That the defendant, Maysville and Big Sandy Railroad Co., constructed and laid a double track along said Third St., and thus longitudinally and permanently appropriated the whole of said street to its use throughout its entire length in the Fifth Ward of said city, and thus rendered the same unfit to be traveled over and upon by wagons and vehicles, although the same is now and was, at all times herein mentioned, frequently and commonly used for foot travel by a large number of pedestrians in and about said city; which fact was well known to defendants at the time of the injuries herein complained of:"

"Plaintiff states that by reason of the neglectful, careless and unlawful conduct of defendants in running said locomotive and cars against her intestate, as aforesaid, he sustained great external
33 and internal injuries, as a consequence whereof he died, to the damage of his estate in the sum of $25,000.00:"

are all and each of them untrue and palpably so, and were known to the plaintiff to be untrue when made in the amended petition.

Petitioner further states and shows that the allegations of the amended petition filed November 4", 1901, as follows:

"Now comes the plaintiff, Emma R. McCabe, before answer filed, and for amendment to her petition, states that either the facts in the foregoing paragraph are true, or those in this are true, but she does not know which are true:"

"which ordinance plaintiff avers was and is *ultra vires,* null and void:"

"That in pursuance of said ordinance, the defendant, Maysville and Big Sandy Railroad Co., did take possession of and per-
34 manently appropriate, longitudinally to its use, about one-half mile or more of Third Street in said City, which appropriation of said street plaintiff avers was *ultra vires,* null and void; and that said ordinance so adopted by the City of Maysville, as aforesaid, contained a provision that the franchise so attempted to be granted should be of no effect at any time or whenever the defendants, its agents or employés, should run its locomotive and train of cars through said city at a greater rate of speed than six miles an hour; which condition the defendant, Maysville and Big Sandy Railroad Company, its agents and employés, did, at the time of the injuries of plaintiff's intestate, and on divers other days before and since then, break in that at all times herein mentioned, locomotives and trains of cars were run by defendant, its agents and employés, on its said track through the City of Maysville, at a greater rate of speed than six miles an hour; by reason whereof, defendant's track through said city and the cars run thereon, are, and were, at all times herein mentioned, a purpresture and nuisance:"

35 "And that under the laws of Kentucky said lease and transfer was and is illegal, *ultra vires* and void:"

"Plaintiff states that on the — day of December, 1893, pursuant to Sec. 211 of the Constitution of Kentucky, and Section 841 of the

Kentucky Statutes, the defendant, Che-apeake & Ohio Railway Co., became a corporation, citizen and resident of this state by filing in the office of the Secretary of State, and in the office of the Railroad Commission, copies of the charters, or articles of incorporation of the Chesapeake & Ohio Railway Company, organized under the laws of Virginia and West Virginia, authenticated by its seal and by the attestation of its President and Secretary, by virtue whereof defendant, Chesapeake and Ohio Railway Company, at once became and is now a corporation, citizen and resident of this State, and that thereupon the certificate of said incorporation was issued to said defendant by the Secretary of State:"

"That the defendant, Maysville and Big Sandy Railroad Co.,
36 constructed and laid a double track along said Third St., and thus longitudinally and permanently appropriated the whole of said street to its use, throughout its entire length, in the Fifth Ward of said City, and thus rendered the same unfit to be traveled over and upon by wagons and vehicles, although the same is now and was, at all times herein mentioned, frequently and commonly used for foot travel by a large number of pedestrians; which fact was well known to defendants at all times herein mentioned:"

"Plaintiff states that the death of her husband, and intestate, Peter McCabe, *their* caused by the wrongul acts of the defendants, their agents and servants, by the means and in the manner aforesaid, and that their said acts were wilful; by reason *herein of* his estate has been damaged in the sum of $25,000.00:"

are all and each of them untrue and palpably so, and known to the plaintiff to be untrue when made in the amendment.

Your petitioner further states and shows that under and by virtue of its charter and amendments thereto, and particularly of
37 the Act of February 17", 1866, entitled, "An Act authorizing the sale of the Maysville and Big Sandy Railroad, and providing for the organization of a new company under its charter, to construct said road," Session Acts 1866, page 664, and of the General Laws of the State of Kentucky, the defendant, the Maysville and Big Sandy Railroad Company, which, your petitioner states, was reorganized under said act and laws, before the making of said contract and lease, had full power and authority to make a lease or contract for the operation of its railroad by this defendant, and that the contract which it is and was operating said railroad, at the time of the injury complained of, was in pursuance of said authority.

Your petitioner charges and avers that the allegations of the plaintiff's petition and amended petition, hereinbefore recited and controverted, were made, and its co-defendant was made defendant to this action, and was sued for the injury complained of
38 herein, for the sole and fraudulent purpose of depriving this defendant of the right to remove this action to the United States Circuit Court, for the Eastern District of Kentucky, and of depriving that court of its jurisdiction thereof.

Your petitioner offers, herewith, a bond, with good and sufficient surety, for its entering into said Circuit Court of the United States on the first day of its next session, a copy of the record in this suit,

and for paying all costs that may be awarded by said Circuit Court, if said Court shall hold that this suit was wrongfully or improperly removed thereto; and it prays this honorable court to proceed no further herein, except to make the order of removal required by law, and to accept said surety and bond, and to cause the record herein to be removed into said Circuit Court of the United States, for the Eastern District of Kentucky, and it will ever pray.

W. H. WADSWORTH,
Attorney for Petitioner.

39 STATE OF KENTUCKY, *County of Mason, set:*

I, W. H. Wadsworth, being duly sworn, do say that I am the attorney for the petitioner in the above entitled cause; that I have read the foregoing petition and know the contents thereof; that the statements and allegations therein contained are true as I verily believe.

W. H. WADSWORTH.

Subscribed by the said W. H. Wadsworth in my presence and by him sworn to before me this 26″ day of November, A. D. 1901.

My commission as Notary Public expires on the 4″ day of March, 1904.

FRANK P. O'DONNELL,
Notary Public.

40 Mason Circuit Court.

EMMA R. MCCABE, as Administratrix of Peter McCabe, Deceased, Plaintiff,
vs.
CHESAPEAKE & OHIO RAILWAY CO. & AL., Defendants.

Bond.

Know all men by these presents that we, The Chesapeake & Ohio Railway Company, as principal, and W. H. Wadsworth and J. G. Wadsworth, as sureties, are hereby held and firmly bound unto Emma R. McCabe, administratrix of Peter McCabe, deceased, in the penal sum of one thousand dollars; for the payment thereof, well and truly to be made unto the said Emma R. McCabe, administratrix of Peter McCabe, deceased, her heirs and assigns, we bind ourselves, jointly and severally, firmly by these presents:

Yet upon these conditions: The said Chesapeake and Ohio
41 Railway Company, having petitioned the Circuit Court of Mason County, State of Kentucky, for the removal of a certain cause therein pending, wherein Emma R. McCabe, administratrix of Peter McCabe, is plaintiff, and The Chesapeake and Ohio Railway Company is defendant, to the Circuit Court of the United States in and for the Eastern District of Kentucky, at Covington, Ky:

Now, if the said Chesapeake and Ohio Railway Company, your petitioner, shall enter in the said Circuit Court of the United States, for the Eastern District of Kentucky, on the first day of its next session, a copy of the record in said suit, and shall well and truly pay all cost that may be awarded by said Circuit Court of the United States, for the Eastern District of Kentucky, if said Court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void; otherwise in full force and virtue.

Witness our hands and seals this 26" day of November, A. D. 1901.

42 [SEAL.] THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
By W. H. WADSWORTH.
W. H. WADSWORTH. [SEAL.]
J. G. WADSWORTH. [SEAL.]

STATE OF KENTUCKY, *Mason County, set:*

We, W. H. Wadsworth and J. G. Wadsworth, both of Mason County, in said State, the sureties in the foregoing bond, being duly sworn, do depose and say, each for himself, *do depose and say*, that we are residents of the State of Kentucky, and property-holders therein, and that we are, each of us worth the sum of one thousand dollars, over and above all our debts and liabilities and exclusive of property by law exempt from execution, and that each have property in the State of Kentucky liable to execution and of the value of more than one thousand dollars.

W. H. WADSWORTH.
J. G. WADSWORTH.

43 Subscribed in my presence by W. H. Wadsworth and J. G. Wadsworth, and by them sworn to before me this 26" day of November, A. D. 1901.

My commission as Notary Public expires on the 4" day of March, 1904.

[SEAL.] FRANK P. O'DONNELL,
Notary Public.

(At a Court held as aforesaid the day and year aforesaid the following orders were entered.)

Order Filing Demurrer.

The plaintiff then produced her demurrer to said petition, which is ordered to be filed.

Demurrer.

Now comes the plaintiff, Emma R. McCabe, as administratrix of Peter McCabe, deceased, and demurs to the petition for removal, filed

herein under her objection, by the Virginia and West Vir-
44 ginia corporations: (1) Because they have never been sued, and are not defendants to the suit, which they seek to remove; and (2) also because even if they were defendants their petition does not state facts sufficient to entitle them to have said suit removed to the Federal Court.

A. E. COLE & SON,
Attorneys for Plaintiff.

Order Overruling Demurrer.

And the Court, having considered thereof, overrules said demurrer, and adjudges said petition sufficient; to which ruling plaintiff excepts.

At a Court held as aforesaid the day and year aforesaid the following order was entered.

Final Order.

This cause coming on for hearing upon the application of the defendant, the Chesapeake & Ohio Railway Company, for an
45 order transferring this cause to the United States Circuit Court, for the Eastern District of Kentucky, and it appearing to the Court that the said defendant has filed its petition herein for removal in due form, and within the time provided by law, and that said defendant has filed its bond duly conditioned with good and sufficient sureties, as provided by law, and it appearing to the Court that this is proper cause for removal to said Circuit; Now, therefore, it is hereby ordered and adjudged that the cause be, and is hereby, removed to the United States Circuit Court for the Eastern District of Kentucky. And all other proceedings of this Court be stayed, and the Clerk of this Court is hereby directed to make up the record of said cause for transmission to said Court forthwith.

To all of which rulings plaintiff objects and excepts, and prays an appeal to the Court of Appeals, which is granted.

At a Court held as aforesaid on the 14th day of December, 1901.

46 *Order Filing Motion.*

The plaintiff, Emma R. McCabe, Adm'x &c. produced her written motion to set aside the order directing the removal of this cause to the Federal Court, &c. herein, which is ordered to be filed.

Motion.

Mason Circuit Court.

EMMA R. MCCABE, as Adm'x, etc., Plaintiff,
vs.
MAYSVILLE & BIG SANDY R. R. Co., ETC., Defendant.

Now comes the plaintiff, Emma R. McCabe, as Administratrix of Peter McCabe, deceased, and moves the Court to set aside the order entered herein at a former day of this term, directing a removal of this case to the Federal Court of the Eastern District of Kentucky, because the same is contrary to law.

A. E. COLE & SON,
Attorneys for Plaintiff.

47–60 (At a Court held as aforesaid the day and year aforesaid.)

Order Overruling Motion.

The Court, having considered of said motion, overrules the same, to which plaintiff excepts, and prays an appeal to the Court of Appeals, which is granted.

STATE OF KENTUCKY, *Mason Circuit Court, set:*

I, Isaac Woodward, Clerk of the Mason Circuit Court, do hereby certify that the foregoing and annexed 47 pages contain a full, true and complete transcript of the record and proceedings had in said Court in the case therein mentioned.

Witness my hand this 14th day of December, 1901.

ISAAC WOODWARD, *Clerk.*

Fee for transcript $8.40.

* * * * * * *

61 And afterwards at a Court of Appeals held at the Capitol at Frankfort on the 7th day of March, 1902, the following judgment — entered to wit:

PETER MCCABE'S ADM'X, Appellant,
v.
MAYSVILLE & BIG SANDY RAILROAD CO., ETC., Appellee.

Appeal from Mason Circuit Court.

The Court being sufficiently advised it seems to them the judgment herein is erroneous.

It is therefore considered that said judgment be reversed, and

cause remanded for further proceedings consistent with the
62 opinion herein which is ordered certified to said Court. Whole Court except Judge Burnam, sitting: Judges O'Rear and Du Relle dissenting.

It is further considered that the appellant recover of the appellee her costs herein expended.

And on said date the Court delivered the following opinion to wit:

63 Court of Appeals of Kentucky.

(To be Reported.)

March 5, 1902.

EMMA R. MCCABE, Adm'r'x, Appellant,
vs.
MAYSVILLE & BIG SANDY RAILROAD CO., ETC., Appellee.

Appeal from Mason Circuit Court.

Opinion of the Court by Judge Hobson.

Appellant Emma R. McCabe as administratrix of Peter McCabe deceased filed this suit in the Mason circuit court against appellees, the Maysville & Big Sandy Railroad Company and the Cheasapeake and Ohio Railway Company, to recover damages for the death of her intestate, who, she alleged, was killed in September, 1901, while walking along Third street in the city of Maysville by an engine and train of the Cheasapeake & Ohio Railway Co., by reason of the negligence of its agents in charge thereof as well as the negligence of the Maysville & Big Sandy Railroad Co. in permitting it to use the track which was the property of the latter company. She alleged
that after the building and completion of its road and more
64 than twelve months before the injuries to her intestate, the Maysville & Big Sandy Railroad Company leased and transferred its entire line of road to the Cheasapeake & Ohio Railawy Company and that the latter has since that time been in the exclusive possession and control of it; that by the laws of Kentucky the lease and transfer were *ultra vires* and void; that in December, 1893, pursuant to section 211 of the Constitution of Kentucky and section 841, Kentucky Statutes, the Chesapeake & Ohio Railway Co. became a corporation, citizen and resident of this State by filing in the office of the Secretary of State and in the office of the Railroad Commissioner copies of its articles of incorporation and that thereupon a certificate of said incorporation was issued to it by the Secretary of State. She further alleged that the railroad track was laid in Third street under an ordinance from the city authorities; that the railroad took up the whole street, so as to render it unfit for travel by wagons or vehicles; that the city authorities were without power to authorize

such a use of the street and that the ordinance was void and
65 the operations of the trains on it was illegal. She prayed judgment for $25,000.00. The Chesapeake & Ohio Railway Co. filed its petition to remove the case to the Circuit Court of the United States, alleging that it is a corporation created under the laws of the State of Virginia and a citizen of that State and of no other; that the Maysville & Big Sandy Railroad Co. is not a property party to the action and was made a party to it for the sole purpose of preventing a removal of the case to the United States Court; that no cause of action is shown in the petition against the Maysville & Big Sandy Railroad Co.; that it had authority of law to make the lease referred to and is insolvent. It is specially pleaded in the petition that by virtue of the charter and amendments thereto the Maysville & Big Sandy Railroad Company and particularly of the act of February 17, 1866, entitled "An Act Authorizing the Sale of the Maysville & Big Sandy Railroad and providing for the Organization of a new Company under its Charter to Construct said Road" and of the general laws of the State of Kentucky, that Company had
66 full power and authority to make the lease referred to. On this petition the court over the plaintiff's objection ordered the case to be removed to the Federal Court and the plaintiff prosecutes this appeal.

In Powers *v.* C. & O. Railway Co., 169 U. S., 92, the United States Supreme Court said:—

"A petition for removal when presented to the state court becomes a part of the record of that court and must doubtless show, taken in connection with the other matters on that record, the jurisdictional facts upon which the right of removal depends: because if those facts are not made to appear upon the record of that court it is not bound or authorized to surrender its jurisdiction, and if it does the circuit court of the United States can not allow an amendment of the petition, but must remand the case."

It was the duty therefore of the court below when the petition for removal was presented to determine whether the jurisdictional
67 facts upon which the right of removal depended appeared in the petition and if they did not appear to overrule the motion for the removal of the case. On appeal from that judgment the same duty devolves upon this court.

Under the act of Congress the jurisdictional facts to sustain a removal are that "there shall be a controversy which is wholly between citizens of different states and which can be fully determined as between them." It has been held that in a suit against two defendants jointly liable, where one of them is a citizen of the state and the other a citizen of another state if they are properly sued jointly, a removal can not be had by the non-resident defendant. (C. & O. Railway Co. *v.* Dixon's Adm'r, 179 U. S., 131.)

The common law distinctions between the different forms of action have been abolished by our Code of Practice and all persons who are liable for a wrong may now be sued jointly in this State in an action to recover for negligence. A railroad company is given by the state certain franchises and thereby assumes certain burdens.
68 These it can not transfer to another without responsibility for the torts of its tranferee. In the absence of legislative

authority the Maysville & Big Sandy Railroad Co. was therefore liable to appellant jointly with the Chesapeake & Ohio Railway Co., and in this event the suit against the two companies jointly might be properly maintained. To hold otherwise would be to require the plaintiff to prosecute two actions, although each of the defendants was alike liable to him. The question then to be determined is, Did the petition for removal show that the controversy was wholly between the plaintiff and the Chesapeake & Ohio Railway Co. and that the Maysville & Big Sandy Railroad Co. was not a proper party to the action?

An act of the General Assembly approved January 22, 1858, entitled "An act to authorize railroad companies to make certain contracts with each other," is relied on. But this act only refers to "railroad companies in this Commonwealth," or domestic corporations. The act is in these words: (See 2 Stanton's Revised Statutes, 548.)

69 "That all railroad companies in this Commonweatlh shall have power and authority to make, with each other, contracts of the following character: 1. For the consolidation of either the management, profits, or stock of any two or more companies, the roads of which are or shall be so connected as to form a continuous road, either temporarily or permanently. 2. For the leasing of the road of one company to another, provided the roads so leased shall be so connected as to form a continuous line. 3. For the completion in whole or in part, of the unfinished road of any company. 4. For giving a common name and style to any continuous road belonging to two or more companies: *Provided, However,* That all such contracts shall be approved by a majority, in interest, of all the stockholders in each of the contracting companies, at some stated or called meeting of the same.

Sec. 2. That the called meetings of stockholders, provided for in the first section, shall be called by the president and directors of the company, and notice of the time and place thereof, and of

70 the purpose of such meeting, shall be advertised in one or more newspapers of general circulation in the county where the principal office of such company is then kept, for at least two weeks before such meeting."

In the construction of statutes it is a cardinal rule that they are not presumed to be intended to have effect beyond the jurisdiction of the State. The second section of the act can, therefore, have no reasonable application to foreign companies; for it can not be presumed that the legislature intended to regulate the proceedings of the president, directors or stockholders of such companies or advertisements to be given in other states. Taking this section in connection with the opening words of the first section, "all railroad companies in this Commonwealth," we see no room for doubt that the legislature intended to confer these privileges only on domestic companies.

As to the power of the Maysville & Big Sandy Railroad Co. to make the lease we are also referred to the following provision in its charter:—(Act of November 25, 1851, Sec. 8.)

"SEC. 8. That whenever any portion of said railroad shall
71 be completed and in readiness for business, such portion thereof may be put in operation under authority of the board of directors, on such terms for the use thereof as the board of directors may prescribe, not exceeding the maximum rates authorized by the fifteenth section of the act incorporating the Maysville & Lexington Railroad Company; provided, They may make special contracts for special services on such terms and conditions as the parties thereto may agree upon."

We do not see that this section goes further than to authorize the operation of the road under authority of the board of directors. The rule is that charters of this sort are strictly construed.

We are also referred to the following provision: (Act of February 17, 1866, Sec. 3, see acts of 1866, Vol. 1, p. 664).

"The purchaser or purchasers at any such sale after the same has been ratified and approved by said court shall in virtue thereof be invested with the title to said road and all its franchises and chartered privileges as fully and completely as if the same had
72 been originally granted to them. They shall have power to reorganize the company under its charter; and for the purpose of its charter open books and receive and collect subscriptions of stock to said company, make contracts with individuals, corporations and other railroad companies for the building, completion and operating of said road or any part thereof."

When this statute was passed the road was not completed; the purpose of the provision was to enable the company to complete and operate the road. To this end it was empowered to "make contracts with individuals, corporations and other railroad companies for the building, completion and operating of said road or any part thereof." Thus power was granted it to make the contract with the Chesapeake & Ohio Railway Co. above referred to; but no exemption was granted from any liabilities which attached to it and such an exemption as against the public cannot be implied. While there is some conflict of authority we think the great weight supports this conclu-
73 sion. In Harmon *v.* Railroad Co., 28 S. C., 404, the court said:—

"The circuit judge seems to rest his conclusion upon the ground that inasmuch as under the charter of the defendant company it has power to lease its road, it follows necessarily that when the road is leased the company is released from all its obligations to the public and to individuals and these obligations then rest solely upon the lessee. We can not accept this view. It rests upon the idea that inasmuch as the defendant company incurs these obligations in exchange as it were, for the chartered rights and privileges conferred by the Legislature, when such rights and privileges are transferred to another by the consent of the Legislature, the corresponding obligations are likewise transferred to such other person or corporation. This at first view seems plausible, and is the view adopted in some of the states. But it rests upon the unfounded assumption that the defendant company has transferred all of its chartered rights and privileges to the Richmond & Danville Railroad Company. We un-

derstand the testimony as tending to show, and the concession
74 of counsel to be, simply that the defendant company has leased its road to the Richmond & Danville Railroad Company and not that it had transferred all its chartered rights and privileges to that company. On the contrary, this very case necessarily implies that the defendant still maintains its corporate organization and existence, and instead of running its road itself directly has bargained with another company to run it for a compensation, as we must suppose. The defendant company, therefore, in reality still enjoys the benefits of its charter, and can not be permitted to escape its corresponding obligations."

In Driscoll *v.* Railroad, 65 Conn., 254 the court said:

"A grant to a corporation of a right to lay out, construct and operate a railroad is the grant to the corporation of the capacity to exercise a portion of the powers of sovereignty for the purpose of making pecuniary profit to itself. This is its franchise. Such grants are never made except at the request of the corporation. In
75 return, the corporation is held to have promised to pay just damages to any person injured by any want of care in using the right so granted. As the grant is of a public right in which every one of the public is a sharer, so the promise is to each one of the public. A due regard for the public rights obviously requires that a corporation which has asked for and received such a grant shall not be absolved from its promises except by an act of the Legislature to that effect so distinct and unequivocal as not to be open to mistake. Nothing should be left to inference."

In Braslin *v.* Railroad Co. 145 Mas. 68 the court said:

"The sanction of the Legislature was given to the contract as made by the parties, but added nothing by way of exemption from the primary responsibility of the lessor. * * * It was under a positive duty and obligation to the public and the consent of the Legislature to the making of the lease did not imply a discharge from the duty and obligation. * * * Where a corporation seeks to escape from the burden imposed upon it by the Legislature clear
76 evidence of a legislative assent to such exoneration should be found."

In Logan *v.* Railroad Co., 116 N. C., 946 the court said:

"After conferring upon a corporation the right of eminent domain with many other special privileges which the Legislature is empowered to grant only in consideration of its duty and obligation to serve the people by affording them the means of safe as well as speedy transportation for themselves and their property, the State can not be held to have abdicated its right to protect the patrons of the road who are under its care by the strained construction of a naked power to lease. Such a power does not carry with it the authority of the lessor to absolve itself and transfer its duties and obligations to another, whether able or unable to respond in damages for its wrongs or defaults."

These were all suits against the lessor where the lease was authorized by statute.

See to the same effect Balsley *v.* The Railroad Co., 119 Ill., 68, 59

Am., Rep., 784; Singleton *v.* Southwestern Railroad Co., 70 Ga., 464, 48 Am. Rep., 574; Tillett *v.* Norfolk, etc. Railroad Co.,
77 118 N. C. 1031; Central Railroad Co. *v.* Morris, 68 Tex., 59; Chollette *v.* Omaha etc. Railroad Co. 26 Neb., 169; 4 L. R. A., 135; Parr *v.* Spartensburg Railroad Co., 43 S. C., 197; Pennsylvania Co. *v.* Ellett, 132 Ill., 654; Stevens *v.* Railroad Co., 36 Iowa, 327; Bower *v.* Railroad Co., 42 Iowa, 546; East Line etc. Railroad Co. *v.* Lee, 71 Tex., 558.

In some states a distinction is made between injuries resulting from the negligence of the lessee alone and those resulting from the failure of the lessor to discharge some duty imposed by law upon him, where the lease is authorized by statute and the lessor is only held liable for the latter. Thus the lessor is held responsible where cattle stray upon the track and are injured while the road is operated by the lessee by reason of the failure to fence the track as required by statute; or where a person is injured by reason of the improper construction of a station house too near the track; or an injury re-
sults from a failure to put in sufficient cattle guards; or there
78 is a failure to transport persons or property as required by the charter of the lessor. (Heron *v.* St. Paul etc. Railway Co., 68 Minn., 542; Lee *v.* Southern Pacific Railroad Co., 116 Cal., 97, 38 L. R. A., 71; Bean *v.* Railroad Co., 63 Me., 295; Nugent *v.* Boston etc. Railroad Co. 80 Me., 62; Lakin *v.* R. R. Co., 13 Or. 436, 57 Am. R. 25).

After citing a number of these cases in his note to Lee *v.* Southern Pacific Railroad Co., 58 Am. St. Rep., 152, Freeman commenting on them, says:

"If it be true, as the decisions with substantial unanimity admit, that a lessor railway remains liable for the discharge of its duties to the public unless expressly exempted therefrom by statute, it seems difficult to conceive its absence of liability in any event, except perhaps where the plaintiff is suing upon an express contract made with him by the lessee corporation. Is it not as much a public duty on
the part of a railway corporation to operate its trains without
79 negligence as it is to receive all freight offered for transportation, or to carry all passengers who offer to pay the regular rates, or to keep its track and station houses in safe condition? In truth we do not know of any duties of a railway corporation which are of a private character."

There are cases in which the lessor has been held not responsible for injuries to the servants of the lessee by reason of the lessee's negligence. (Virginia etc. Railroad Co. *v.* Washington, 86 Va., 629; Hukill *v.* Maysville etc. Railroad Co., 72 Fed. Rep., 745.) These cases rest on the idea that the duty owed to the servant by his employer grows out of the contract of service which is voluntarily entered into by the servant, and that he does not stand to it like the public. In addition to these there is a line of cases holding the lessor not responsible for any acts of the lessee on the ground that legislative authority to lease constitutes the lessee *quoad hoc* the owner of the property and substitutes him for the lessor. (Miller

v. New York etc. Railroad Co. 125 N. Y., 118; Caruthers *v.*
80 Kansas etc. Railroad Co., 59 Kan., 629; and cases cited.)

Upon principle and the weight of authority we are of opinion that the Maysville & Big Sandy Railroad Company is liable to appellant. The obligation to fence the track for the protection of stock or to receive passengers or freight or carry them safely is no more a duty of the lessor imposed upon it by its charter than its duty to avoid injury to the traveling public in the discharge of its functions as in this case. By its acceptance of the franchises conferred by the State the corporation assumed the corresponding burdens thereby imposed. These franchises it could not transfer to another without distinct legislative authority. Such grants are strictly construed and as against the public are never extended by construction.

In the case before us there is only a grant to the lessor of power to contract for the operating of the road. The company enjoys all its franchises in the fruits of the contract. There is nothing
81 in the provision to show that the Legislature had in mind authorizing the company to divest itself of its franchises or permitting it while enjoying them or their fruits to be acquit of responsibility for their abuse, without regard to the financial ability of the lessee or his amenability to suit.

In Harper *v.* N. N. & M. V. Co., 90 Ky., 359 the question was not elaborated and it is apparent from the opinion that only the question of jurisdiction was really considered by the court; for it does not appear from the facts stated that the lease in that case was authorized by statute or under what provision of law it was made.

It is unnecessary for us to pass upon section 211 of the Constitution and Section 841 of the Kentucky Statutes, and determine whether appellee can accept citizenship in this State and so take all its advantages and at the same time plead that it is a non-resident of the State.

Judgment reversed and cause remanded for further pro-
82 ceedings consistent with this opinion.

Judges O'Rear and Du Relle dissent.
Whole Court sitting except Judge Burnam.

A. E. Cole & Son, for Appellant.
W. H. Wadsworth, for Appellees.

83 Be it remembered that on the 8th day of April, 1902, the appellee by counsel filed in the office of the Clerk of the Court of Appeals a petition for rehearing.

Be it remembered that on the 14th day of April, 1902, at a Court of Appeals held at the Capitol at Frankfort, the following order was entered to wit:

McCABE'S ADM'X
v.
M. & B. S. R. R. Co.

Mason.

Came the appellee by counsel and filed a petition and moved the Court to grant a rehearing herein, and the case is submitted on the motion and petition, with leave to withdraw and print said petition.

And afterwards on the 1st day of May, 1902, at a Court of Appeals held at the Capitol at Frankfort, the following order was entered to wit:

McCABE'S ADM'X
v.
M. & B. S. R. R. Co.

Mason.

Came appellee by counsel, and filed printed copies of petition for rehearing herein.

The petition for rehearing mentioned in foregoing order is as follows:

84 No. 1.

Court of Appeals of Kentucky.

PETER McCABE'S ADMINISTRATRIX, ETC., Appellant,
vs.
MAYSVILLE AND BIG SANDY RAILROAD COMPANY and CHESAPEAKE AND OHIO RAILWAY COMPANY, Appellees.

Petition for Rehearing.

May it please the Court:

In view of the great importance of the questions of law involved on this appeal a rehearing is respectfully asked.

The question whether Appellee, the Chesapeake and Ohio Railway Company, was entitled to remove this cause to the United States Court depends (leaving out of view the question of fraudulent joinder of its co-appellee) upon whet-er appellant's petition states a separate cause of action against it from that stated (if any is stated) against the Maysville and Big Sandy Railroad Company.

85 The question is not whether those two causes of action can be properly joined in one suit. An action may be brought under our Code jointly against the maker and indorser and acceptor of a bill of exchange; but it does not thence follow that there is any joint cause of action against them. In truth, it is well

settled that the cause of action against each is separate and distinct from the cause of action against the others. It is a cause of action on a different contract.

Our contentions, in brief, are, that,

1. Appellant's petition states no cause of action against anybody but the Chesapeake and Ohio Railway Company. It states no cause against the Maysville and Big Sandy Railroad Company at all.

2. Conceding that a cause of action is stated against the Maysville and Big Sandy Railroad Company, it is a separate and distinct cause of action from that stated against the Chesapeake and Ohio Railway Company.

The sole allegation of any wrong doing on the part of the Maysville and Big Sandy Railroad Company contained in the petition, is that it wrongfully leased its road and franchises to its co-appellee. The opinion in this cause decided that the making of that lease was not wrongful, but on the contrary that it was expressly authorized to make it by the Act of 1886. And yet this Court holds
86 that although no wrongful act whatever is alleged to have been done by the Maysville and Big Sandy Railroad Company, still a cause of action against it is stated, and in reaching that conclusion overrules the case of Harper *vs.* Newport News, &c., Co., 90 Ky., 359, which expressly decides the contrary. That decision was not an *obiter dictum,* but on a point vitally essential to the conclusion reached. There the lessor company's charter gave it express power "to sell or lease" but contained no clause exempting it from liability for the torts of the lessee. Acts of 1881, Vol. 1, Page 256.

The decision on that point in the Harper case was expressly approved by this Court in the late case of Eichorn *vs.* L. & N. R. R. Co., 23 Ky. L. Rep., 1640, in an opinion delivered by the present Chief Justice on December 18, 1901. It is there said, speaking of the Harper case, the lessor company "filed a general demurrer to the petition, which was sustained, and properly so, as stated in the opinion, for the reason that the Newport News and Mississippi Valley Co., having the exclusive control of the road, was unanswerable in damage to the plaintiff."

On principle, it is submitted that the doctrine of the Harper and Eichorn cases is sound. When the Legislature empowers
87 a railroad corporation to lease its road, it thereby empowers it to transfer the exclusive possession and control of it to another. The word "lease" contains the idea that the lessor parts with all right to control or possess the leased property. A valid lease divests the lessor of all right of possession and control of the leased property during the term just as effectually and as fully as does a deed of conveyance in fee simple. Assuming that the Maysville and Big Sandy Railroad Company had the right thus to divest itself of the possession and control of its railroad, (and the opinion in this case decides that the Legislature of 1886 intended to give it that right,) then to make it responsible for the negligence of its lessee, is to make it liable for the wrongful act of a third party which it had no power to prevent, even had it, by its president and other

officers, been present at the time McCabe was killed and saw the wrongful acts being committed which resulted in his death. It had no more power or right to interfere with its lessee's management of its trains during the term for which it had leased the road than had any passenger or any citizen. Upon what legal principle then can it be made liable for a wrongful act of somebody else over whom it had no control? There are two, and only two, grounds upon which one person is ever held liable for the wrongful act of another.
88 One is upon the ground of *agency*, where the wrongdoer is the agent or servant of the person so held liable. The other is upon the ground of *contract*, the person has contracted to be liable for the other's wrong.

1. The relation of the lessor and lessee—of landlord and tenant—is not that of principal and agent, or master and servant. A landlord is not liable for the negligence of his tenant. The legal relation of lessor and lessee no more resembles that of principal and agent than does the relation of vendor and vendee, or grantor and grantee. A lease is a totally different thing from a contract of agency. One is an executed transfer of *property*, the other is a mere contract which creates a status between persons. The doctrine contended for is forcibly stated in 2 Elliott on Railroads, Sec. 465, thus:

"When power to execute a lease is conferred upon a corporation, "the Legislature must in the absence of countervailing language, "be deemed to intend to authorize the execution of such an instru- "ment as the established law regards as a lease. The law enters as "a silent factor into every contract and hence of every lease it is an "important element. The legal effect of a lease is to transfer for a "prescribed period of time the possession and control of the
89 "property to the lessee. In authorizing the execution of a "lease, the Legislature grants the right to execute and carry "into effect such an instrument as divests the lessor of possession "and control, and places it in the lessee to the exclusion of the "lessor. The possession of the one party is excluded and that of "the other made complete by legislative sanction. If a sale is made "under valid legislative authority, the company that acquires the "property acquires an exclusive right and interest, and the lessee "by virtue of the lease acquires a similar right so far as posses- "sion, control and management are concerned for the term for "which the property was leased. It cannot be doubted that a "statute conferring general authority to sell means a complete and "effective sale, and upon the same principle it must be concluded "that the power to lease, unless qualified and limited by statute, is "a power to make a complete and effective lease. A complete and "effective lease certainly vests the right of possession, control and management in the lessee, since no other effect can be assigned "such a lease without a direct and palpable violation of long and "well established principles of law. The lessor company does no "wrong in executing a lease which the law of the land gives it full "power to execute so that in executing the lease there is no
90 "improper motive, no illegal act, nor any wrongful attempt "to escape a duty. In granting authority to lease, the Legis-

"lature empowers the lessor company to transfer the duty of operat-
"ing the road to the lessee, and in doing what the Legislature au-
"thorizes no public policy is violated. It is indeed inconceivable
"that there can be a violation of a rule of public policy where the
"act done by a party is done under a legislative enactment and in
"accordance with its provisions. The cases which hold the lessor
"liable, although the lease is an authorized one, upon the ground
"that there must be express exemption from liability in order to
"exonerate the lessor, concede, what could not be denied without
"leaving the domain of reason, that the Legislature may by ex-
"press enactment exonerate the lessor, so that even upon that
"theory (which we believe to be unsound) the question, at bottom,
"is one of statutory construction. The courts which assert the
"theory mentioned tacitly assume that in granting authority to
"lease, the Legislature granted something less than an authority to
"lease. We believe that the only theory that can be defended on
"principle is that in granting authority to execute a lease the Legis-
"lature conferred authority to execute an effective instrument with
"all the qualities and incidents with which the law invests a
91 "lease. If this be true, then the lease does transfer posses-
"sion and control from the one party to the other for the
"term of the lease, and the rights and obligations of the parties are
"such, and such only, as the law annexes to the relation of lessor
"and lessee."

In Caruthers *vs.* Kansas City R. Co., 44 L. R. A., 745, the Kansas Court says that to hold the lessor liable for the negligence of the lessee is in effect to hold "that the lessee company was not a lessee, but was a mere agent of the lessor."

In the light of these considerations, it is respectfully submitted that, in view of the fact that Appellant alleges that the Maysville and Big Sandy Railroad Company leased its road to the Chesapeake and Ohio Railway Company, and in view of the fact that the opinion in this case holds that the Legislature had granted to the Maysville and Big Sandy Railroad Company the right to make this lease, there remains no ground whatever, on principle, for holding the Maysville and Big Sandy Railroad Company liable for the killing of McCabe by the Chesapeake and Ohio Railway Company on the theory that the company doing the wrong was the agent or servant of the Maysville and Big Sandy Railroad Company.

2. Is the Maysville and Big Sandy Railroad Company
92 liable for the torts of its lessee on the ground that it has contracted to be so liable? It seems to me that this thought really underlies the line of cases holding the lessor of a railroad liable for the torts of the lessee. For instance, in Driscol *vs.* R. Co., 65 Conn., 254, quoted by this Court in its opinion, the lessor's liability for the torts of the lessee is put on the ground that the corporation to whom a charter to build and operate a railroad is granted, "is held to have promised to pay just damage to any person injured by any want of care in using the right so granted." The same idea is expresses by this Court, thus: "By its acceptance of the franchises conferred by the State the corporation assumed the

corresponding burdens thereby imposed." The logic of the position may be stated this way:—The charter of a railroad company is a contract by which (amongst other things) the corporation contracts to operate its road without negligence. This contract obligation thus assumed is called "the duty it owes to the public," or, as the Connecticut Court puts it "the promise made to each one of the public," of which duty it cannot divest itself without a legislative release from it; and the conclusion drawn is that an authority to lease its road does not imply a release from its contract duty
93 to operate its road without negligence. That conclusion, I submit, is unsound.

When the Legislature releases a corporation from the duty of operating its road (and it certainly does so release it when it authorizes it to lease its road out—to turn over the possession and control and management of it to another corporation) that necessarily carries with it a release from the duty of operating it carefully, *i. e.*, without negligence. No part of its contract to operate *carefully* can remain in force when it is absolved from its duty to operate it altogether. If A leases to B his farm under a contract by which B agrees to cultivate it prudently, and A afterward releases B from his contract to cultivate it altogether, there would remain no longer any contract duty on B to cultivate it prudently, because there would remain no duty to cultivate it at all.

I submit, therefore, that although there might have been a charter contract between the State and the Maysville and Big Sandy Railroad Company by which the Company agreed to operate its road carefully, yet, when the State empowered the company to lease its road, it thereby releases it from its duty to operate it altogether during the term for which it was leased, and consented to its
94 being operated solely by the lessee. As pointedly put by the U. S. Circuit Court of Appeals in Arrowsmith *vs.* Nashville R. Co., 57 Fed. R. 178, "To say that, after the lessor has by authority of law transferred the control and management of its road to another, he shall, unless specially exempted, remain liable for all the torts and contracts of the lessee, is to ignore the contract of lease and the legislative sanction under which it was made."

It is, therefore, respectfully submitted that the doctrine laid down by this Court, in the Harper Case, 90 Ky., 359, and reaffirmed in the Eichorn case, as late as December, 1901, is sound in principle and should not be overruled. The lessee of a railroad is not the servant or agent of the lessor; neither can the lessor be under any duty to operate a road carefully when it is absolved by the Legislature from operating it altogether.

In 5 Thompson on Corporations, Sec. 6293, in speaking of the doctrine making a lessor of a railroad liable for the torts of its lessee, the learned author says:

"These decisions are, in strictness, applicable only to cases where "the railroad company has presumed to attempt to cast off its pub- "lic duties, by leasing its railroad properties to another corporation,
" without direct authority of the law. They have no just ap-
95 " plication to cases where the leasing is authorized by an act of
" the Legislature, in which case the lessor will not, in principle

"at least, be liable for the torts of the lessee in managing and "operating the property, any more than the lessor of a farm will be "liable for the torts of its lessee in the managing of it."

The doctrine of the Harper and Eichorn cases is supported by the great preponderance of authority outside of Kentucky. Upon this point see the exhaustive note to Caruthers *vs.* Kansas City, &c., R. Co., 44 L. R. A., 737, and the elaborate consideration and classification of the authorities as well as able discussion of the doctrine in question, by the United States Circuit Court of Appeals, in Arrowsmith *vs.* Nashville R. Co., 57 Fed. Rep., 165, opinion by Judge Lutron.

If we are wrong in the above position, the question yet remains, does Appellant's petition state a joint cause of action against the Maysville and Big Sandy Railroad Company and the Chesapeake and Ohio Railway Company?

The opinion in this case states that it was held in Chesapeake and Ohio Railroad Company *vs.* Dixon, 179 U. S., 131, that if a resident and a non-resident "are properly sued jointly, a removal cannot be had by the non-resident defendant." It is with profound deference and respect submitted that the Dixon case does not decide
96 that. What it does decide is that there the plaintiff's petition stated a joint cause of action against all the defendants. The killing of plaintiff's intestate in that case was alleged to have been done by the joint negligence of the corporation and its employees, and the opinion says, in substance, that could be tru-, for the corporation may have ordered the employees to run the train at the excessive rate of speed. It expressly says that it is unnecessary to decide, and it does not decide, whether the case of Warax *vs.* R. Co., 72 Fed. Rep., 642, was sound or not, in which case the doctrine was laid down by the United States Circuit Court of Appeals that when a corporation is sought to be held liable for the negligence of its servants on the doctrine of *respondeat superior*, the cause of action against it is not a joint cause of action with that against the negligent employé so as to prevent a removal to the Federal Court by the corporation on the ground of "separable controversy."

In the present case there is no allegation of a joint wrong doing by the two defendants whatever, as there was in the Dixon case. The wrongful act charged against the Maysville and Big Sandy Railroad Company is entirely distinct and different from that charged against the Chesapeake and Ohio Railway Company. The latter is charged with wrongfully running against and killing McCabe; the
97 former is charged with wrongfully leasing its road.

Inasmuch as the allegations of Appellant's petition show (in the light of the Act of 1886) that the lease was not wrongful, it is submitted that it is not shown that the Chesapeake and Ohio Railway Company was the agent or servant of the Maysville and Big Sandy Railroad Company; and the liability of the latter cannot be based on the doctrine of *respondeat superior*. If the liability of the Maysville and Big Sandy Railroad Company is to be put upon the ground of its duty assumed by its charter contract, then it seems very clear that a cause of action against it based on its contract with

the State, is not a joint cause of action with that founded on the tort of its lessee. A cause of action against one man for a tort is not a joint cause of action with one against another on his contract.

"The mere fact that the plaintiff may have the right to make "several parties defendant in the same action does not settle the "question whether the petition presents separable controversies. "* * * The cause of action is a breach of contract or a tort "committed by the defendant. This is not to be confounded with
"the injury resulting therefrom, nor with the remedy pro-
98 "vided by the law for the benefit of the party injured in per-
"son or property." Beutel *vs.* Chicago Ry. Co., 26 Fed. Rep.,
50.

I maintain, therefore, that Appellant's petition does not, as was done in the Dixon case, state a joint cause of action against Appellees; and, therefore, the Chesapeake and Ohio Railway Company was entitled to remove the case to the Federal Court, even though it be conceded that the petition does not state a good cause of action against the Maysville and Big Sandy Railroad Company.

The opinion herein further holds that Sec. 203 of the Constitution makes the lessor of a railroad liable for the contracts and torts of the lessee. The opinion says:

"The franchises of a corporation are its property. The declara- "tion that these, in case of a lease or alienation, shall not be relieved "from the liability of the lessor or grantor, lessee or grantee, con- "tracted or incurred in the use of the franchise or any of its privi- "leges, is in substance a declaration that the corporation shall not "be relieved of such liability; for its existence is inseparable from "all of its franchises. Under this section, therefore, no lease made "by a corporation can exempt it from liability for the wrongs of
"its lessee."

99 If this construction of Sec. 203 be sound, then it must equally be true that no sale of its property made by a corporation can exempt it from liability for the torts of its vendee; nor from liability on its vendee's contracts. Furthermore, a statute which would undertake to exempt a corporation from liability on the contracts, or for the torts of a corporation to whom it might sell or lease its property, would be unconstitutional.

It is most respectfully and with deference submitted that the Court in the above quotation has failed to keep in mind the distinction between the "franchises of a corporation" and the franchise of corporate existence, which latter franchise does not belong to the corporation at all, but to the corporators. This distinction is clearly pointed out by Judge Matthews in delivering the opinion of the Supreme Court of the United States in Memphis R. Co. *vs.* Comrs., 112 U. S., 609. He says:

"The essential properties of corporate existence are quite distinct "from the franchises of the corporation. The franchise of being a "corporation belongs to the corporators; while the powers and privi- "leges vested in and to be exercised by the corporate body as such
"are the franchises of the corporation. The latter has no
100 "power to dispose of the franchise of its members, which
"may survive in the mere fact of corporate existence, after

"the corporation has parted with all of its property and all its fran-
"chises." See, also, 4 Thompson on Corporations, Sections 5336, 5353 and 5370.

If that statement be true, the statement in the opinion in this case that "its (the corporation's) existence is inseparable from all its franchises," cannot be true. A corporation may, and often does, continue to exist after it has parted with all its franchises—just as an individual may continue to exist after he has parted with all his property, and just as a ferryman may continue to exist after he has leased or sold his franchise to operate the ferry. The other statement in the opinion that the declaration that the franchises of a corporation shall not be relieved from liability for its lessee's torts is, in substance, a declaration that the lessor corporation itself shall not be relieved from such liabilty is, I respectfully submit, equally unsound. Surely a declaration that certain *property* shall be subject to certain liabilities incurred in its use is not equivalent to a declaration that the *owners* of that property shall be subject to a personal liability therefor.

It is true that the franchises of a corporation are its property; but the franchise of corporate existence is not the property of the corporation; it belongs to the corporators. The Constitution,
101 in speaking of a corporation leasing and selling franchises, evidently refers to franchises that belong to it, and not to a franchise that does not belong to it.

In the case of Lee *vs.* Southern Pacific R. Co., 116 Cal., 97, 58 Am. St. Rep., 140, the Supreme Court of California construes a section of the Constitution of that State, which is substantially identical with section 203 of the Kentucky Constitution, and decides that it does not give a right of action against a railroad company, which had leased its road, for the torts of the lessee in operating the road.

That was a case where a lessor railroad company was sued jointly with its lessee for the negligence of the lessee resulting in the *a* personal injury to the plaintiff, and where it was contended that that section of the California constitution made the lessor liable to such an action. So that the case is on all fours with the present one, so far as this question is concerned. The Court says:

"It will be noted that the section does not attempt to give, and it "is not intended to give, a personal action against a corporation "where none existed before. It is designed to subject the franchise
"and property of a corporation, whether the franchise be
102 "exercised, or the property be used by the corporation itself,
"or by another, to liability for breach of duty. * * *
"So far as the case at bar is concerned, it can have but this applica-"tion and no other. It would enable the plaintiff injured by the "negligence of his employer, the lessee company, to make good his "judgment, under appropriate proceedure, out of the leased prop-"erty, but it would not operate to give the plaintiff, an employee of "the lessee company, a right of action against the lessor company."

The true meaning of Section 203 is, I submit, that which is plainly expressed by the language used. It makes the franchises and property held thereunder subject to liabilities incurred either by

the lessor or lessee in the operation or use of those franchises and property. So that if a railroad company should incur a liability in operating its road it could not shield its road and the franchise of operating it from being subjected to the payment of such liability, by leasing or selling the road even under legislative authority. So, too, if the lessee of the road should incur a liability in operating it nothing in the terms of the lease or legislative act authorizing the lease could shield the road from being subjected to the payment of the liability. Even if the lease was for a year only, or a month only, yet the whole property, if necessary, could be made
103 liable for the torts of the lessee in operating it.

In Bailey *vs.* Southern Ry. Co., 22 Ky. L. Rep., 1397, it was sought to hold a vendee of a railroad liable on the contracts of its vendor under this Section 203 of the Constitution, but this Court decided that said section did not impose such liability.

For a full and clear exposition of the meaning and purpose of that section of the Constitution we refer to the opinion of the California Court in Lee *vs.* Southern Pacific R. Co., 116 Cal. 97, 58 Am. St. Rep., 140.

A rehearing and an affirmance of the judgment below is respectfully asked.

E. L. WORTHINGTON,
For Appellees.

W. H. WADSWORTH,
Of Counsel.

104 And afterwards at a Court of Appeals held at the Capitol at Frankfort, on the 6th day of May, 1902, the following order was entered—

McCABE'S ADM'X
v.
M. & B. S. R. R. Co.

Mason.

Came the appellant by counsel and filed a response to petition for rehearing herein.

The response to petition for rehearing mentioned in the foregoing order is as follows:

105 Court of Appeals of Kentucky.

PETER McCABE'S ADMINISTRATRIX, Appellant,
vs.
MAYSVILLE & BIG SANDY RAILROAD COMPANY, Appellees.

Response to Petition for Rehearing.

May it please the court:

The petition of appellee, Chesapeake & Ohio Railway Company, for rehearing, so far from presenting any reason, not already an-

swered in the able and cogently reasoned opinion, why the court should reopen this case, has, by entering appellee's appearance, presented an additional reason why the request for a rehearing and affirmance should be denied. Pickersgill *vs.* Read 7 Hun. (N. Y.) 636; Matthews *vs.* Marin Co. Ct. 70 Cal; Guilerslaid Overseers *vs.* Know Overseers 5 Cow. (N. Y.) 364; Ellis *vs.* Ellis 13 Neb. 91.

106 Since cases throughout the State of Kentucky, especially in the nineteenth judicial district thereof, are awaiting the action of the court in this case; the public interest will be subserved by an immediate consideration of the petition and a wise public policy upheld by the adherence of the court to the sound doctrine enunciated in its opinion, which will forever hold a place among the land-marks in the jurisprudence of this state.

Respectfully submitted.

A. E. COLE & SON,
By A. D. COLE,
Attorneys for Appellant.

107 And afterwards on the 21st day of May, 1902, at a Court of Appeals held at the Capitol at Frankfort, the following order was entered, to wit:

McCABE'S ADM'X
v.
M. & B. S. R. R. Co.

Mason.

The court being sufficiently advised, the opinion herein is corrected on its face, and petition for rehearing is overruled.

And afterwards on the 28th day of May, 1902, at a Court of Appeals held at the Capitol at Frankfort, the following order was entered to wit—

McCABE'S ADM'X
v.
M. & B. S. R. R. Co.

Mason.

Came the appellant by counsel and filed a petition, and moved the Court to extend the opinion herein, and the case is submitted on the motion and petition.

(The petition for extension mentioned in the foregoing order is as follows:)

108 Kentucky Court of Appeals.

EMMA R. McCABE, Administratrix, etc., Appellant,
vs.
MAYSVILLE & BIG SANDY RAILROAD COMPANY, ETC., Appellees.

Petition for Extension of Opinion.

May it please the court:

The consession which this court has made to counsel for appellee on petition for rehearing is so great that we fear the effect in the opinion of the Federal Court has been practically to emasculate it, unless this court can see its way clear to grant this petition for extension of the opinion. On May 20th, pursuant to notice, we attended a special session of the Federal Court at Covington, which for convenience was held at Cincinnati. Judge C. D. Clark of Chattanooga Tennessee, sat as special judge to hear argument on a motion to remand the case of Nancy Wilson's Adm'r's *vs.* M. & B. S. R. R. Co. and C. & O. Ry. Co., to the Lewis Circuit Court, whence
109 with other unfortunates they were sent and have been for two years endeavoring in vain to get back home and have their case tried by a jury of their peers. The contention was boldly asserted and plausibly maintained on this occasion by counsel for appellee, that this court has at no time decided that Sec. 241 of the Constitution and Sec. 6 Kentucky Statutes created or gives *a joint cause of action* and that this court until the Dixon & Winston cases had distinctly held that said sections were enacted for an entirely different purpose; that in the last named cases this court was simply asserting an illogical conclusion that the defendants at common law were jointly liable and not that there was under the statute a joint cause of action; that this being true his Honor, Judge Clark, should follow the Warax and Hukill cases rather than this court's illogical deduction from the principles of the common law. Such interpretation of this court's language we stoutly opposed and in argument quoted from the McCa*ge* case as containing the latest pronouncement on the subject. Again, we were met with the contention that this court was not therein interpreting any statute which the Federal Court would be bound to follow. Still insisting on our former
110 position we pointed out also that Sec. 203 of the State Constitution was being interpreted. However, Judge Clark freely confessed at about this point of the discussion that in the absence of any interpretation that there is a Kentucky Statute creating *a joint cause of action* or a construction of the State Constitution that would be binding on him, he would follow the Arrowsmith & Hukill cases instead of the McCabe case.

He still has the case under consideration and it is understood that Judge Cochran proposes to follow the opinion of Judge Clark; so it is extremely important that there be no misunderstanding of this court's language. Thus we arrive at the point of this petition and we earnestly request the court to extend its opinion so as to read at the proper place substantially thus: "The common law distinctions

between different forms of action have been abolished by our code of practice and, as often held by this court, all persons who are liable for a wrong may now under Sec. 241 Constitution and Sec. 6 Kentucky Statutes be sued jointly in this State in a joint cause of action to recover for negligence."

The change made in the original opinion being material,
111 we submit that to obviate useless and protracted litigation about what this court has intended, the ends of justice will be met by granting this petition; which ought to set at rest all doubt.

That we may be able to communicate to Judge Clark, at an early date, the mind of this court in language that cannot be misunderstood, we will thank your Honors to give this petition an immediate consideration.

Respectfully submitted.

A. E. COLE & SON,
By A. D. COLE,
Attorneys for Appellant.

112 And afterwards on the 7th day of June, 1902, at a Court of Appeals held at the Capitol at Frankfort, the following order was entered to wit:

McCABE'S ADM'X
v.
M. & B. S. R. R. Co.

Mason.

The Court being sufficiently advised, the petition for modification is overruled.

1–3 THE COMMONWEALTH OF KENTUCKY:

The Court of Appeals.

Pleas Before the Honorable the Court of Appeals of Kentucky, at the Capitol at Frankfort, on the 5th Day of December, A. D. 1905.

PETER McCABE'S ADM'R'X, Appellant,
vs.
MAYSVILLE & BIG SANDY R. R. Co., ETC., Appellees.

Appeal from the Mason Circuit Court.

Be it remembered that on the 15th day of July, 1905, the appellant by her attorney filed in the office of the Clerk of the Court of Appeals, a transcript of the record herein, and which is in words and figures as follows—

* * * * * * *

4 *Amended Pet.*

Now comes the plaintiff Emma R. McCabe as administratrix of Peter McCabe, deceased, before answer filed and amends her petition herein and for amendment states that, the defendant, Maysville and Big Sandy Railroad Co., became a corporation originally in 1850 by an Act entitled an act to incorporate the Maysville and Big Sandy Railroad Co., and found in 2 Acts of 1850 page 73; that thereafter said charter was amended by an Act of the legislature entitled an act to amend the Charter of the Maysville & Big Sandy Railroad Co., found in the acts of 1865-'66 page 64; that in
5–15 1879-'80 there was a re-incorporation of said road after a foreclosure sale by the purchasers thereof by virtue of an act entitled an act to incorporate the Maysville & Big Sandy Railroad Co., found in 2 Acts of 1879 page 27.

That in all of said acts and amendments only general powers of eminent domain were given to the defendant, Maysville & Big Sandy Railroad Co., but no special power was ever granted to said defendant by the legislature of Kentucky to occupy or appropriate longitudinary or perpetually or otherwise, said third street or any other of the streets of the City of Maysville. Plaintiff therefore avers and charges that the defendants herein were at the time and place of the injuries to her intestate trespassers on said street and that the injuries inflicted on her intestate by them aforesaid were done with the full knowledge by defendants. That they nor neither of them had a right to be there.

Wherefore plaintiff prays as in her petition and for all proper relief.

A. E. COLE & SON,
Attorneys for Plaintiff.

* * * * * * *

16 & 17 At a Court held as aforesaid on the day and year aforesaid, the following order was entered.

Order Offering to File Answer.

The defendants produced and offered to file their answers herein, to which plaintiff objected, and the court took time.

* * * * * * *

18 At a Court held for the Mason Circuit Court on the 18th day of February, 1904, the following orders were entered by the Hon. John D. Carroll, Special Judge.

Orders.

The court having considered of plaintiff's objection to the filing of defendants' answer herein offered on Nov. 17th, 1903, and being sufficiently advised, sustains the same and refuses to allow said

pleading to be filed, to which ruling defendants except, and on their motion, it is ordered that said pleading be, and the same is hereby made a part of the record in this case.

The court having considered of defendants' objection to the filing of plaintiff's motion herein, offered on Nov. 16th, 1903, overrules the same, and adjudges that the same be filed, which is done. To which ruling defendants except.

The court having considered of said motion, and being fully advised, sustains the same to the extent, that it now adjudges
19 that plaintiff's amended petition filed in the Clerk's office on the 7th day of October, 1901, be, and the same is hereby noted of record; but overrules said motion to the extent, that the court is asked to adjudge the allegation of plaintiff's petition as taken for confessed, and for a jury to assess the amount of damages due the estate of her intestate, to which ruling plaintiff excepts.

Thereupon plaintiff offered her amended petition, to the filing of which, defendants objected, and the court overruled said objection and permitted said amended petition to be filed, which is done. To which ruling, the defendants excepted.

The defendants still objecting to the jurisdiction of the court and not waiving said objection upon their motion, are allowed to answer herein to the merits; and thirty days are now given them in which to prepare and file their amended answer herein, to which motion the plaintiff objected, which objection was overruled and to the ruling of the court, overruling said objection and permitting said amended answer to be filed, the plaintiff excepted, and there-
20 upon, upon her motion, plaintiff is given ten days time, after the filing of said amended answer in which to reply, and the cause is continued.

Answer.

The defendants, the Maysville and Big Sandy R. R. Co., and the Chesapeake and Ohio Railway Co., for answer herein and special plea to the jurisdiction of the court, state that on December 11th, 1901, the defendant, the Chesapeake and Ohio Railway Co., duly filed in this action its petition to remove same to the Circuit Court of the United States, in and for the Eastern District of Kentucky, which petition was accompanied by the proper bond, such as is required by the Federal Statutes; and this petition and bond was filed herein within the time required by law to effect the removal of this action. Thereupon this court by an order duly entered herein, accepted said petition and approved said bond, and ordered that this action should be removed to the said Circuit Court of the United States, for the Eastern District of Kentucky. Thereafter, on the 13th of January, 1902, said defendant duly filed in the office of the Clerk of the United States Circuit Court, Eastern District
21 of Kentucky, a duly certified transcript of all the proceedings in this action, and said action was thereupon placed upon the docket in said court. Thereafter, in said court, on motion of defendants, a rule was issued against plaintiff to show cause why she should not be required to give a bond for costs, or make a de-

posit of money in lieu thereof, as required by the rules of said court, and thereafter, on March 11th, 1902, after the plaintiff was served with said rule, she filed a response thereto in said court. After the decision of the Court of Appeals of Kentucky herein, which reversed the judgment of this court ordering said action to be so removed, to-wit, on March 13th, 1902, the plaintiff by her counsel, appeared in said United States Circuit Court, Eastern District of Kentucky, and filed her written motion therein to remand this cause to the Mason Circuit Court, and on the same day she filed therein, by her said counsel, a brief in support of said motion to remand, and also the opinion of the Court of Appeals of Kentucky, wherein it reversed the judgment of this court as aforesaid.

22 The defendants thereafter entered their appearance to said motion and resisted same and filed their brief in said court, opposing the granting of said motion; and thereupon said court took said motion under advisement, and same pended in said court until the 19th day of October, 1903, when said United States Circuit Court overruled said motion of plaintiff, by a judgment duly rendered by it and entered upon its order book which said judgment is still in full force, unmodified and unreversed. By reason of all of which these defendants now say that plaintiff is estopped by said judgment of the United States Circuit Court, to say or assert that said court does not have exclusive jurisdiction of this action, and to say that the Mason Circuit Court has any jurisdiction thereof, or had any jurisdiction thereof after the filing by the defendant, the Chesapeake and Ohio Railway Co., of said petition for removal and bond as aforesaid. Wherefore, these defendants say that this, the Mason Circuit Court, has no jurisdiction to proceed further in this action, and they pray that the same be dismissed and for their costs herein and all proper relief.

23 E. L. WORTHINGTON.
W. H. WADSWORTH.

Motion.

The plaintiff, Emma R. McCabe as Admx. of Peter McCabe, deceased, hereby withdraws her motion and affidavit filed in the Circuit Clerk's office on May Rule day 1903, and moves the court to note of record, her amended petition theretofore filed in the said Clerk's office on 7th day of October, 1901, and to adjudge the allegations of her petition as taken for confessed, and for a jury to assess the amount of damages due the estate of her intestate.

EMMA R. McCABE,
As Adm'x of Peter McCabe, Deceased,
By ALLAN D. COLE, *Her Att'y.*

Amended Petition.

The plaintiff, Emma R. McCabe, as Administratrix of Peter McCabe, deceased, before answer filed amends her petition herein and for amendment states, that the injuries aforesaid were inflicted

upon her intestate while he was walking along said Third
24 street in said City of Maysville and upon a board crossing connecting either end of an alley way crossing said Third street at Right angles, which alley way is much and frequently used by the public and was with said crossing at all times herein mentioned much and frequently used by the public, especially for passengers; that said crossing on which her intestate was injured is about midway between the public crossing aforesaid at Commerce St. and the public crossing aforesaid at Poplar St. or about one hundred and fifty yards from each of said crossings; that defendants, their agents and servants, were accustomed to whistle and ring the bell for each of said crossings, which signals could easily be heard by any one at said crossing wherein plaintiff's intestate was hurt, and were relied upon by persons using said crossing; that on the occasion of said injuries to her intestate, defendants, their agents and servants carelessly and negligently failed to blow the whistle, ring the bell or stop said train or even to slack*ing* the speed thereof;
that said locomotive engine and train of cars then operated
25 by defendants, their agents and servants, was being run at a dangerous and excessive rate of speed, to-wit, from forty to fifty miles an hour or more through a public street in a thickly populated portion of said city of Maysville; that defendants, their agents and servants by the exercise of reasonable diligence could have seen her intestate at the place of said injury in time to have prevented the same, although said crossing was especially dangerous by reason of obstructions in places along the track in the vicinity of said crossing. That by reason of said carelessness and negligence of the defendants, their agents and servants, her intestate received said injuries resulting in his death to the damage of his estate in the sum of $25000.00.

Wherefore plaintiff prays as in her petition and for all proper relief.

ALLAN D. COLE,
Att'y for Pl't'ff.

At a Court begun and held for the Mason Circuit Court on the 25th day of February, 1905, the following order was entered.

26 The defendants produced their amended answer herein, which is ordered to be filed.

Amended Answer.

The defendants come and not waiving their objections to the jurisdiction of this court, and to its proceeding any further with the trial of this action, and objecting and protesting against the same, with leave of court amend their answer herein, and for amended answer to plaintiff's petition and amended petitions herein deny:

That the defendant, Maysville & Big Sandy Railroad Company's railroad extends from the City of Covington, Ky. only to the western limits of the City of Maysville, or that said road goes on thence only

from the eastern limits of the city of Maysville to the City of Ashland, Boyd County, Ky. They deny that the ordinance granted, for right of way by the City of Maysville to the Maysville & Big Sandy Railroad Co., on the — day of —— 18— by the Board of Council of Maysville, Ky. the same referred to in the original petition,
27 was, or is, *ultra vires,* null or void. They deny that in pursuance of said ordinance, or otherwise, the defendant, the Maysville & Big Sandy Railroad Co., did take possession of or permenently appropriate longitudinally to its use, about one-half mile or more of Third Street in said city, and they deny that said appropriation of said street was *ultra vires,* null or void. They deny that the ordinance referred to in the petition adopted by the City of Maysville, contained a provision that the franchise so attempted to be granted, should be of no effect if at any time or whenever the defendant, its agents or employés, run its locomotives or train of cars through said city at a greater rate of speed than six miles an hour. They deny that the Maysville and Big Sandy Railroad Co., or its agents or employés, did at the time of the injuries to plaintiff's intestate or on divers other days before or since then, break said alleged condition, or that at any time locomotives or trains of cars were run by said defendants, its agents or employés, on its said track through the City of Maysville, at a great- rate of speed than six miles an hour; and they deny that by reason thereof said defendants'
28 track through said city, or the cars run thereon, are, or were, at any of the times, a purpresture or nuisance. They deny that at the time of the granting of said franchise to the defendant, Maysville & Big Sandy Railroad Co., the Board of Council of the City of Maysville also enacted an ordinance making it unlawful for any railroad or railway company, its agents or servants, to operate or run locomotives or train of cars upon or through any of the streets of said city, at a greater rate of speed than six miles an hour; and they deny that any such ordinance stands unrepealed or is in full force or effect. They deny that under the laws of Kentucky the lease or transfer from the defendant, the Maysville & Big Sandy Railroad Co., to the defendant, the Chesapeake & Ohio Railway Co., of its line of road and franchises, was, or is, illegal, *ultra vires* or void. They deny that on the — day of December, 1893, or other day pursuant to Sec. 211 of the Constitution of Kentucky, or Sec. 841 of the Kentucky Statutes, the defendant, the Chesapeake & Ohio Railway Co., became a corporation, citizen and resident of the State of Kentucky, by filing in the office of the Secretary of State,
29 or in the office of the Railroad Commission, copies of the charter or articles of incorporation of the Chesapeake & Ohio Railway Co., organized under the laws of Virginia, or West Virginia, authenticated by its seal and by the attestation of its President and Secretary, or that by virtue thereof, the defendant, the Chesapeake & Ohio Railway Co., at once, or at all, became or is now a corporation, citizen or resident of the State of Kentucky, or that thereupon the certificate of said incorporation, was issued to said defendant, the Chesapeake & Ohio Railway Co., by the Secretary of State of Kentucky.

They deny that while plaintiff's intestate, Peter McCabe, was walking along Third street in Maysville, Ky., or in a short distance from public crossings of the railroad, either east or west of him, he was run over by a train of the Chesapeake & Ohio Railway Co. They deny that the said McCabe at said time was in plain view of the conductor, engineer or fireman, or employés of the Chesapeake & Ohio Railway Co., on the engine or locomotive or train operated
30 by said defendant, its agents or servants.

They deny that the said McCabe while so walking along Third street in said city, was on the — day of September, 1901, or other day, willfully, wantonly, carelessly, or negligently run against or struck by a locomotive or train of cars of the Chesapeake & Ohio Railway Co. They deny that said McCabe was run over or struck without fault on his part. They deny that the locomotive or train of cars were then or there being run over or upon said Third street in violation of the ordinance of the City of Maysville, or at a greater rate of speed than six miles an hour. They deny that the defendant, the Chesapeake & Ohio Railway Co. its agents or servants, or any of them, saw, or by the exercise of ordinary care or reasonable diligence, could have seen the said McCabe in time to have prevented his death.

They deny that the injuries complained of were sustained by the said McCabe either by reason of the negligence of the defendant, the Maysville & Big Sandy Railroad Co., in suffering the defend-
31 ant, the Chesapeake & Ohio Railway Co., its agents or servants, to operate its locomotive engine or train of cars on its tracks, or by reason of the negligence of the defendant, the Chesapeake & Ohio Railway Co., its agents or servants, who were in charge of said train. They deny that the injuries to plaintiff's said intestate, would not have been inflicted upon him but for the carelessness or negligence of the defendants, the Maysville & Big Sandy Railroad Co., or Chesapeake & Ohio Railway Co., their agents or servants, or any of them, as aforesaid, that is, as alleged by the plaintiff. They deny that the killing of said intestate was done by the negligence of defendants, their agents or servants, or any or either of them. They deny that his estate has been damaged in the sum of $25000.00 or any other sum. They deny that the defendant, the Maysville & Big Sandy Railroad Co., longitudinally or permanently appropriated the whole of Third street in Maysville, Ky., to its use throughout its entire length in the fifth ward of said city, or for any distance in said ward, or other ward, or that it thus rendered the same unfit to be traveled over or upon by wagons or vehicles and it denies
32 that Third street is now, or was at any of the times in the pleadings mentioned, frequently or commonly used for foot travel by large or any number of pedestrians in said city, and they deny that any such fact was known to defendants, or either of them, at the time of the injuries herein complained of. They deny that while plaintiff's intestate was walking along Third street, between Poplar and Commerce streets, or at or near the place known as the Commerce street crossing, the defendants, the Chesapeake & Ohio Railway Co., in an unlawful manner caused one of its locomotives or

train of cars to be run or conducted along or over said Third street, or at or near said crossing in so negligent, careless or reckless manner as to strike, or inflict upon, plaintiff's intestate, the injuries complained of, and they deny that at said time the said intestate was without fault, or that he was lawfully walking on said street. They deny further that no bell was rung on said locomotive or train of cars while running over said Third street, and they deny that the same was required by proper or prudent management; and they deny that said train was permitted to run along said street at a reckless or excessive speed.

33 They deny that it ran along said street at a rate of fifty miles an hour, or without giving any signal or warning of its approach. They deny that they, or either of them, were guilty of any neglectful, careless or unlawful conduct in running said locomotive or cars against plaintiff's intestate, or that because of any such neglectful, careless or unlawful conduct on the part, or either of them, the plaintiff's intestate sustained great or any injuries, or as a consequence whereof he received great or any external or internal injuries. They deny that his estate has been damaged in the sum of $25000, or any other sum.

The defendants answering the amended petition of November 4th, 1901, deny that the alleged facts, or any of them, in the original petition or amended petitions, or any of them, are true: and they deny that the plaintiff does not know which of the facts she alleges are true. They deny that plaintiff's intestate was on the — day of September 1901, or other day, with force or arms, wrongfully, knowingly or intentionally run against, or struck by a locomotive

34 or train of cars of the Chesapeake & Ohio Railway Co. They deny that the defendant, the Chesapeake & Ohio Railway Co., its agents or employés, were then or there trespassers, or that the said company, or its agents or servants, wrongfully, knowingly or intentionally, operated or run said locomotive engine or train of cars at a reckless or excessive rate of speed, or at a speed of forty miles or that the same was done contrary to the contract, or said ordinance of the City of Maysville. They deny that the defendant, the Chesapeake & Ohio Railway Co., its agents or servants, wrongfully, knowingly or intentionally failed or refused to ring the bell or give any warning or signal of the approach of the locomotive engine or train of cars which struck plaintiff's intestate. They deny that the — plaintiff's intestate was caused by the wrongful acts of the defendants, or either of them or their agents or servants, or any of them, by the means or in the manner aforesaid; and they deny that their said alleged acts or any of them were willful, or that by reason thereof, said decedent's estate has been damaged in the sum of $25000.00 or any other sum.

They deny that any of the alleged negligent acts of defendants or either of them, caused the injury to plaintiff's intestate

35 sued for. They deny that any of the acts of negligence alleged to have been committed by defendants, or either of them, or any of the alleged negligent omissions of defendants, or either of them, caused the injury to plaintiff's intestate sued for.

The defendants deny that in all the acts of the legislature set up in the amended petition of December 18th, 1902, the Maysville & Big Sandy Railroad Co. was given only general power of eminent domain, and they deny that no special power was ever granted to the defendant by the legislature of Kentucky, to occupy or appropriate longitudinally or perpetually, or otherwise, Third street, or any of the streets of the City of Maysville; and they deny that at the time and place of the injury complained of, they, or either of them, were trespassers on said Third street or that the injuries inflicted on plaintiff's intestate were done with the full or any knowledge of defendants, or either of them, or with any knowledge that they, or either of them, had no right to be there.

The defendants deny that the injuries complained of were inflicted upon plaintiff's intestate while he was walking along
36 Third street in Maysville, Ky., or upon a board crossing connecting either end of an alley way crossing said Third street at right angles; and they deny that said alley way is much or frequently used by the public, or was, with the crossing, at any times mentioned, much or frequently used by the public or especially by foot passengers. They deny that said alleged crossing is about midway between the public crossing at Commerce street and the public crossing at Poplar street, or about 150 yards from either of said crossings.

They deny that the defendants, or either of them, or their agents or servants, or any of them, were accustomed to whistle for either of said crossings, and they deny that signals, by whistle or bell, were relied upon by persons using said crossings. They deny that on the occasion of the injuries complained of, their agents or servants, or any of them, carelessly or negligently failed to blow the whistle, ring the bell or stop the train or slacken the speed thereof. They deny that the locomotive engine or train of cars was being run at a dangerous or excessive rate of speed, or from 40 to 50 miles an
37 hour or more. They deny that it was through a thickly populated portion of the City of Maysville. They deny that the defendants or either of them, their agents or servants or any of them, by the exercise of reasonable diligence could have seen her intestate at the place of said injury in time to have prevented the same. They deny that the said crossing was especially dangerous by reason of obstructions in places along the track in the vicinity of said crossing. They deny that by reason of the said alleged carelessness or negligence of the defendants, or either of them, their agents or servants, or any of them, plaintiff's intestate received the injuries resulting in his death, and that his estate was thereby damaged in the sum of $25000.00 or any other sum. Wherefore &c.

Par. 2. The defendants further answering state that at the time and on the occasion of the injuries complained of in the petition and amended petition, the decedent, Peter McCabe, was himself guilty of negligence which contributed to his injuries and death, and but for which negligence on his part the injuries would not have
38 been received and the death would not have been occasioned.

Wherefore having fully answered, they pray that they be hence dismissed, with judgment for their costs herein expended.

E. L. WORTHINGTON.
W. H. WADSWORTH.

At a Court held as aforesaid on the 29th day of February, 1904, the following order was entered.

Order Filing Reply.

The plaintiff produced her reply to the second paragraph of defendants' amended answer herein, which is ordered to be filed.

Reply.

For reply to the second paragraph of defendants' amended answer herein, the plaintiff denies that at the time or on the occasion of the injuries complained of in the petition and amended petition, the decedent, Peter McCabe, was himself guilty of negligence which contributed to his injuries or death; or that but for said
39 alleged negligence on his part the injuries would not have been received or his death would not have been occasioned. Wherefore, having replied plaintiff prays as in her former pleading and for all proper relief.

ALLAN D. COLE,
Att'y for Pl'ff.

(At a court held as aforesaid on the 20th day of December, 1904.)

Order Refusing to File Amended Ans.

The defendants produced and offered to file their amended answer herein, to which plaintiff objection, and the court being advised sustains said objection, and refused to permit said amended answer to be filed. To which defendants except.

Order Making Same Part of Record.

On motion of defendants, it is ordered that said amended answer be made a part of the record.

Amended Answer.

The defendants, the Maysville and Big Sandy R. R. Co., and the Chesapeake and Ohio Ry. Co. with leave of court, amend their answer herein and for amendment state that on December
40 11th, 1901, the defendant, the Chesapeake and Ohio Ry. Co. duly filed in this action its petition to remove same to the Circuit Court of the United States, in and for the Eastern District of

Kentucky, which petition was accompanied by the proper bond, such as is required by the Federal Statutes; and this petition and bond was filed herein within the time required by law to effect the removal of this action. Thereupon this Court by an order duly entered herein, accepted said petition and approved said bond, and ordered that this action should be removed to said Circuit Court of the United States, for the Eastern District of Kentucky. Thereafter, on the 13th of January, 1902, said defendant duly filed in the office of the Clerk of the United States Circuit Court, Eastern District of Kentucky, a duly certified transcript of all the proceedings in this action, and said action was thereupon placed upon the docket in said Court. Thereafter in said Court, on motion of defendants, a rule was issued against plaintiff to show cause why she should not be required to give a bond for costs, or make a deposit of money in lieu thereof, as required by the rules of said court, and
41 thereafter, on March 11th, 1902, after the plaintiff was served with said rule, she filed a response thereto in said court.

After the decision of the Court of Appeals of Kentucky herein which reversed the judgment of this court, ordering said action to be removed, to-wit: on March 13th, 1902, the plaintiff by her counsel appeared in said United States Circuit Court, Eastern District of Kentucky, and filed her written motion therein to remand this cause to the Mason Circuit Court, and on the same day she filed therein by her said counsel, a brief in support of said motion to remand, and also the opinion of the Court of Appeals of Kentucky, wherein it reversed the judgment of this court as aforesaid. The defendants thereafter entered their appearance to said motion, and resisted same and filed their brief in said court, opposing the granting of said motion; and thereupon said court took said motion under advisement, and same pended in said court until the 19th day of October, 1903, when said United States Circuit Court overruled said motion of plaintiff, by a judgment duly rendered by it and entered upon its order book, which said judgment is
42 still in full force, unmodified and unreversed.

Defendants state that afterwards on the — day of ——, 1904, the Maysville and Big Sandy R. Co., filed in the said Circuit Court of the United States in said action, its general demurrer to the petition of plaintiff herein, and the defendant, the Chesapeake and Ohio Ry. Co., on the — day of ——, 1904, filed in said action, in said court, its answer therein, which answer was a general denial of the allegations of the petitions and the plea of contributory negligence; and afterwards on the 12th day of April, 1904, the said cause having been duly submitted upon the demurrer of the said Maysville & Big Sandy R. Co., and the said United States Circuit Court being duly advised, sustained the same, and the plaintiff failing and declining to plead further, the petition and cause of action against the said Maysville & Big Sandy R. Co., was, by a judgment of the said United States Circuit Court, dismissed, and said court adjudged against the plaintiff and in favor of said defendant, its costs in the

action expended; and upon the same day the 12th day of
43 April, 1904, the said cause in said United States Circuit Court upon the regular call of the docket was duly submitted to the court for hearing, and it appearing that the plaintiff had failed to controvert the allegations of the answer of the Chesapeake & Ohio Ry. Co., the defendant herein setting up the contributory negligence of the decedent McCabe, the said court by its judgment in said court, duly dismissed the petition and cause of action of the plaintiff against the said Chesapeake & Ohio R. Co., and said court adjudged against plaintiff in favor of said defendant its costs herein expended. Copies of said demurrer, orders, and judgments are herewith filed and made part hereof marked Exhibit "A." Both of said judgments are still in force and effect and unreversed, and the defendants, and each of them, plead the same in bar to plaintiff's right to recover against them, or each of them, in said action.

Wherefore having fully answered the defendants pray that they be hence dismissed, with judgment for their costs herein expended.

44 WORTHINGTON & COCHRAN,
W. H. WADSWORTH,
Att'ys for Defendants.

The affiant W. H. Wadsworth, states that he is one of the attorneys of the defendants herein, and also the agent of same; that all of the chief officers and agents are absent from Maysville, Mason County, Ky., and that he believes the statements of the foregoing amended answer are true.

W. H. WADSWORTH.

Subscribed and sworn to before me by W. H. Wadsworth this 20th day of December, 1904.

ISAAC WOODWARD, *Clerk.*

Following is Exhibit "A."

EXHIBIT "A."

United States Circuit Court, Eastern District of Kentucky.

April Term, Monday April 4th, A. D. 1904.

Court met.

Present: Hon. A. M. J. Cochran, Judge. Hon. S. G. Sharp, U. S. M. Hon. J. H. Tinsley, U. S. District Attorney.

45 No. 2286.

EMMA R. MCCABE, Adm'x,
vs.
M. AND B. S. RY. CO. ET AL.

This day this cause coming on to be heard came the defendant, the C. and O. Ry. Company, by its attorney, Hon. W. H. Wadsworth,

and files its answer to the plaintiff's petition herein. On motion of the plaintiff, this cause is now set down for trial on Tuesday, April 12th, 1904.

UNITED STATES OF AMERICA, *Eastern District of Kentucky, ss:*

I, Jos. C. Finnell, Clerk of the United States Circuit Court for the Sixth Judicial Circuit and Eastern District of Kentucky, at Covington, do hereby certify that the foregoing is a true and correct copy of an order made and entered in the matter set out in the caption hereto, as the same appears from the records and files of this office.

Witness, my hand as Clerk and the seal of said Court, at Covington, this 20th day of December, A. D., 1904, and of our Independence the 129th year.

46 [SEAL.]

JOS. C. FINNELL, *Clerk.*
J. W. MENZIE, *D. C.*

Circuit Court of the United States, Eastern District of Kentucky, at Covington.

No. 2286.

EMMA R. MCCABE, Adm'x, &c.,
vs.
MAYSVILLE AND BIG SANDY R. R. Co. and CHESAPEAKE & OHIO RY. Co.

Motion for Judgment.

Now comes defendant the Chesapeake and Ohio Ry. Company, on this April 12th, 1904, the day on which this cause has heretofore been specially set for trial and moves the court for a judgment adjudging that plaintiff take nothing by her petition and that same be dismissed and for a judgment against her for this defendant's costs herein; on the ground that this defendant is entitled to such judgment on the face of the pleadings herein.

47

W. H. WADSWORTH,
E. L. WORTHINGTON,
Att'ys for Defendants.

UNITED STATES OF AMERICA, *Eastern District of Kentucky, ss:*

I, Jos. C. Finnell, Clerk of the United States Circuit Court, for the Sixth Judical Circuit and Eastern District of Kentucky, at Covington, do hereby certify that the foregoing is a true and correct copy of motion for Judgment filed herein on April 12" A. D., 1904 in the matter set out in the caption hereto, as the same appears from the records and files of this office.

Witness my hand as Clerk and the seal of said court, at Covington, this 20" day of December, A. D., 1904, and of our Independence the 129" year.

JOS. C. FINNELL, *Clerk.*
J. W. MENZIES, *D. C.*

48 United States Circuit Court, Eastern District of Kentucky.

April Term, Tuesday, April 12" A. D. 1904.

Court met.

Present: Hon. A. M. J. Cochran, Judge. Hon. J. H. Tinsley, U. S. District Attorney. Hon. S. G. Sharp, U. S. M.

No. 2286.

EMMA R. MCCABE, Adm'r'x, &c.,
vs.
THE MAYSVILLE AND BIG SANDY RY. COMPANY ET AL.

The court having considered of the demurrer of defendant of the Maysville and Big Sandy Ry. Company, to plaintiff's petition and being advised, sustains same and plaintiff failing and declining to plead further, it is adjudged that said petition, as to said defendant be dismissed. The court having considered the motion of
49 defendant, the Chesapeake and Ohio Ry. Company for a judgment herein, in its favor on the face of the pleadings and being advised, sustains same and it is adjudged that plaintiff take nothing by her petition against said defendant, and that same as to said defendant be dismissed. It is further adjudged that each of the defendants recover of plaintiff its costs herein expended to be levied of any assets that have or may come to her hands as Administratrix of Peter McCabe to be administered.

UNITED STATES OF AMERICA, *Eastern District of Kentucky, ss:*

I, Jos. C. Finnell, Clerk of the United States Circuit Court, for the Sixth Judicial Circuit and Eastern District of Kentucky, at Covington, do hereby certify that the foregoing is a true and correct copy of an Order made and entered herein, in the matter set out in the caption hereto, as the same appears from the records and files of this office.

Witness my hand as Clerk and the seal of said court, at Covington, this 20" day of December, A. D. 1904, and of our Inde-
50 pendence the 129" year.

[SEAL.] JOS. C. FINNELL, *Clerk.*
J. M. MENZIES, *D. C.*

* * * * * * *

At a Court begun and held for the Mason Circuit Court on
51 the 8th day of March, 1905, the following orders were entered by Hon. John D. Carroll, Special Judge.

Order Refusing Amended Petition to be Filed & Making it Part of Record.

The plaintiff produced and offered to file her amended petition herein, to which defendants objected, and the court being advised,

sustains said objection, and refuses to permit said amended petition to be filed.

Ordered that said amended petition be made a part of the record.

Amended Petition.

The plaintiff, Emma R. McCabe as Administratrix of Peter McCabe deceased, by leave of court amends her petition and withdrawing any allegations that may be inconsistent herewith says, that while the City of Maysville undertook by said ordinance as aforesaid, to authorize the Maysville & Big Sandy R. R. Co. to lay its tracks along and upon Third St. in said city from Lexington street to the city limits, yet it did not undertake to authorize nor did it authorize said Maysville & Big Sandy R. R. Co. to appropriate
52 long-udinally or at all said Third street from Bank street to Lexington St., that said defendants, Maysville & Big Sandy R. R. Co., and Chesapeake & Ohio Ry. Co. their agents and servants, were at the time and place of said injury to her intestate operating said locomotive, engine and train of cars without authority of law, and that each and all of said defendants, their agents and servants, were then and there trespassers as were also said railroad track and said locomotive, engine and train of cars then and there a purpresture and a nuisance. Wherefore, plaintiff prays as in her petition and for all proper relief.

A. D. COLE,
Attorney for Pl'ff.

* * * * * * *

53 The court having considered of said motion, sustains same.

Jury, &c.

This day came the parties, and thereupon came the following jury to-wit:

George W. Wood, James Cooper, C. T. Ramey, James Breeze, W. R. Key, J. C. Rains, Chas. McCarthey, Jacob Rhodes, Pat Comer, J. L. McDowell, W. F. Munzing and F. M. Costigan, who were duly empaneled and sworn to try the issue. At the conclusion of plaintiff's testimony, the defendants moved the court to instruct the jury to find for the defendants, to which plaintiff objected, and the court being advised, overrules said motion, to which ruling, the defendants except, and the Jury aforesaid not having fully heard the evidence, are continued until 9 o'clock to-morrow morning, and are allowed to disperse after receiving the usual charge *for* the court.

At a Court held as aforesaid on the 9th day of March, 1905.

Order Cont. Cause, &c.

54 Again came the parties, and the jury empaneled and sworn herein on yesterday, appeared and took their seats. At the conclusion of all the testimony, the defendants moved the court to

instruct the jury to find for the defendants, and the court overruled said motion, to which defendants excepted. And the jury aforesaid having fully heard the evidence and argument of counsel, retired to their room to consult of their verdict, and not agreeing thereon, were discharged, and the cause is continued.

At a court begun and held for the Mason Circuit Court on the 15" day of June 1905, the following orders were entered by Hon. John D. Carroll, Special Judge.

Ordered that Miss Bessie Johnson, the Official Stenographer of this court, be directed to take full Stenographic notes of the testimony in this case.

Jury, &c.

This day came the parties, and thereupon came the follow-
55 ing jury to-wit: Bela Metcalf, B. F. McIntire, D. L. Hunter, Thos. Molloy, D. J. Rees, James Ross, Albert K. Boyd, H. E. Pogue, T. B. Osborne, Joseph Lowery, C. F. Loyd and B. P. McClanahan, who were duly empaneled and sworn to try the issue. At the conclusion of plaintiff's testimony, the defendants moved the court to instruct the jury to find for defendants, to which motion plaintiff objected, and the court reserved its decision on said motion until all the testimony was introduced: And at the conclusion of all the testimony, the court overruled plaintiff's objection and sustained said motion, and instructed the jury to find for defendants, to which ruling of the court plaintiff excepted. And thereupon the Jury aforesaid returned the following verdict:

Verdict.

"We the Jury by the direction of the court, find a verdict for the defendants.

B. P. McCLANAHAN, *Foreman.*"

Judgm't.

It is therefore adjudged by the court that plaintiff take
56 nothing by her petition, and from her, the defendants recover her costs herein expended, to be levied of the assets of the estate of said Peter McCabe in her hands to be administered, or which hereafter may come to her hands to be administered. To which judgment plaintiff objects and excepts.

Orders Filing & Overruling Mot. for New Trial.

The plaintiff moves the court to set aside the verdict and judgment herein, and grant her a new trial of this action; and produced her grounds in writing therefor, which are ordered to be filed.

The court having considered of said motion, overrules same, to which ruling plaintiff excepts, and prays an appeal to the Court of Appeals, which is granted.

Motion & Grounds for New Trial.

The plaintiff, Emma R. McCabe as Administratrix of Peter McCabe deceased, moves the court to set aside the verdict and judgment entered herein, and to grant her a new trial for the following reason, to-wit:

First, the court erred to the prejudice of plaintiff in giving a peremptory instruction directing the jury to find for de-
57 fendants, to which ruling plaintiff at the time excepted and still excepts.

Second, the court erred to the prejudice of the plaintiff in refusing to admit competent testimony contained in avowals No. 1 and 2, and otherwise offered by plaintiff, to which ruling plaintiff at the time excepted and still excepts.

Third, the court erred to the prejudice of plaintiff in permitting defendants to introduce irrelevant and incompetent evidence, to which ruling the plaintiff at the time excepted and still excepts.

Fourth, the verdict is not sustained by the evidence and is contrary to law.

Fifth, the verdict is contrary to the evidence.

Wherefore etc.

ALLAN D. COLE,
Att'y for Pl'ff.

At a court held the day and year aforesaid.

Orders.

On motion of plaintiff, time up to and including the
58–228 10″ day of the next term of this court, is given her to prepare and file her Bill of Exceptions.

The Official Stenpgrapher who took down in short hand the evidence in this case, is ordered to furnish to counsel for plaintiff, a transcript of the evidence taken down by her.

It appearing to the satisfaction of the court pending the consideration of the motion and grounds for a new trial, the plaintiff is unable to pay for said transcript and has filed her affidavit herein, showing her inability to pay for said transcript and asking to be allowed to prosecute this appeal in *forma pauperis*.

* * * * * * *

229 And afterwards at a Court of Appeals held at the Capitol at Frankfort the following Judgment was entered—

PETER MCCABE'S ADM'X, Appellant,
v.
MAYSVILLE AND BIG SANDY RAILROAD CO., ETC., Appellees.

Appeal from Mason Circuit Court.

The court being sufficiently advised, it seems to them the judgment herein is erroneous.

It is therefore considered that said Judgment be reversed, and

cause remanded for a new trial, and for proceedings consistent with the opinion herein, which is ordered certified to said court.

It is further considered that the appellant recover of the ap-
230 pellee her costs herein expended.

And on said date the Court delivered the following opinion—

231 No. 2.

Court of Appeals of Kentucky.

Dec. 5, 1905.

PETER MCCABE'S ADMINISTRATRIX, Appellant,
vs.
MAYSVILLE & BIG SANDY R. R. Co., &c., Appellees.

Appeal from Mason Circuit Court.

Opinion of the Court by Judge Settle.

This action was brought by the appellant, Emma McCabe, as the administratrix of the estate of Peter McCabe, deceased, against the appellees, Maysville & Big Sandy R. R. Co. and its successors, the Chesapeake & Ohio Ry. Co., to recover of them damages for the death of her intestate, which resulted from wounds occa-
232 sioned by his being struck by a passenger train of the latter company in the City of Maysville.

Upon the conclusion of all the evidence heard upon the trial, the jury in obedience to a peremptory instruction from the court returned a verdict for appellees. Judgment was thereupon entered in appellees' favor and appellant's motion for a new trial having been overruled, she seeks by this appeal a reversal of the judgment.

The intestate was sixty-nine years of age at the time of his death and his place of residence was on the south side of Third Street between Commerce and Poplar streets, in the City of Maysville. Appellees have a double track on Third street, of that city, for almost its entire length. The street is also constantly used by pedestrians and vehicles. Appellant's intestate was injured at the crossing of Bruce's alley between Commerce and Poplar streets. From Bruce's alley crossing to the crossing at Poplar street, going east, the distance is 350 feet, and from there to Lexington street 400
233 feet. From the crossing at Bruce's alley to a point about 50 feet east of Lexington street the railroad track is straight, but at the latter point it curves toward the south, but the evidence shows that after rounding the curve in the direction of Bruce's alley, the engineer upon a locomotive can, by keeping a lookout, see a man on the track at the alley a distance of between 700 and 800 feet ahead of the locomotive.

Upon the afternoon of receiving his injuries the intestate intending to find a purchaser for some peaches he had for sale, stepped out

into his yard, looked up and down the railroad tracks in front of his house, and seeing no train approaching, walked to the street and upon the south railroad track where, turning westwardly, he went in the direction of Bruce's alley crossing, the alley being beyond the north track, and then about 300 feet from him. He had gone but a little way when a west-bound passenger train came up behind him, but on the north track, and the intestate, having by the time it got to where he was, crossed over to the north
234 track, was struck by the train at or about the Bruce's alley crossing. When examined by the physician, who was called to see him, it was found that he had received a slight wound on the back of the head, another of considerable length along the back and side and under the arm, and yet another in the leg between the knee and thigh which broke the bone.

The death of McCabe occurred eight days after his injuries were received. His conduct in crossing from the south track, where he was out of the way of the approaching train, to the north track, and in the way of it, would have been incomprehensible but for his own explanation of the matter to his physician and family after he was injured, which was that he discovered the train when it was on or about leaving the curve, but thought it was coming on the south track on which he was then walking, whereupon he left the south track and crossed over to the north track to avoid the train and reach the north track as the train struck him. This statement of
235 the accident the physician and others were permitted to relate upon the trial without objection from appellees' counsel, presumably upon the ground that it conduced to prove the intestate guilty of contributory negligence as alleged in appellees' answer. It also appears to have afforded the lower court sufficient ground for the giving of the peremptory instruction. This conclusion of the court would prevail with us, but for another feature of the case which we think should not be overlooked. That is that there was some evidence which tended to prove that but for the improper rate of speed at which the train was run through the street, and the failure of both the engineer and fireman to keep a lookout ahead of it, the intestate's injuries might have been prevented.

We are aware that the testimony was conflicting on these points and also as to whether there was any warning given of the approach of the train, by the ringing of the bell or sounding of the
236 whistle, but we cannot say that the testimony was, as a whole, sufficient to justify the conclusion that the injuries of McCabe were caused solely by his own negligence.

Several witnesses, some of them having no interest whatever in the case, testified that instead of keeping a lookout as the train passed through Third street, both the engineer and fireman were looking toward a house they were passing and waiving their hands at some of its inmates. The fireman died before the case came to trial, but the engineer whose testimony appears in the record, does not satisfactorily deny or refute the testimony given against him on this point, and he admits that he did not see McCabe at all on

the occasion of the accident, or know that he had been injured until later notified of it.

As already indicated, McCabe made the statement to his physician and others that he saw the train as it turned the curve which was nearly 800 feet away, and that thinking it was coming on the
237 south track on which he was walking, he at once left that track and started for the other. Other witnesses say he proceeded some distance toward the alley crossing before he attempted to get on the north track which he did not in fact reach until the train struck him. If he could see the train as it struck the curve, nearly 800 feet away, what was there to prevent the engineer and fireman from seeing him at a like distance, unless, as some of the witnesses testified, they were looking in some other direction than ahead of the train. If, by looking ahead, they would have seen McCabe, they would have understood when he left the south track and went toward the alley crossing over the north track that he was going in the way of their train, consequently, they might have taken the necessary steps to protect him from injury.

According to appellant's witnesses the train was running at the rate of twenty-five or thirty miles an hour. The conductor, engineer and other witnesses of appellees said its rate of speed was fifteen or eighteen miles an hour, according to the admission
238 of the conductor, the train, by use of emergency brakes, etc., could have been stopped within 200 feet after reaching Poplar street. This would have been 150 feet east of Bruce's alley crossing where McCabe was struck, and if the train had stopped 150 feet short of the alley crossing he would not have been injured. According to the further statement of the conductor, if the train was going at the rate of fifteen or eighteen miles an hour, it might have been stopped within 100 or 150 feet after reaching Poplar street, or 200 feet east of Bruce's alley crossing, this too, would have saved the life of McCabe. Obviously if the train had been going at a still slower rate of speed, such as six miles an hour which would have been reasonable, it could have been stopped in a correspondingly shorter time. It may also be said, in view of the testimony of some of the witnesses, that no signal was given of the approach of the train, that if such signals had been given, especially the blowing of the
239 whistle before the train came in sight, it might have kept McCabe off the track until the train passed. It is, however, insisted for appellees that two or more of the witnesses for the defense testified that they saw McCabe when he was struck by the train, and that he ran against it after the engine had passed him, and, therefore, but for his negligence in this respect, the train would have passed without striking him. This testimony does appear in the record, but there is also testimony that tends to contradict it, such as the physical facts manifested by the nature and situation of the wounds that were received by McCabe from his collision with the train. The one on the side, back and under the right arm, would seem to indicate that it was made by the bar of the pilot which projects beyond the side of the cars, whereas the one on the back of the leg was evidently made by contact with the steps of a car. So if the higher wound was made by the bar of the pilot the conclusion

would seem to follow that McCabe first came in contact with
240 the pilot and next with the car steps, and if first with the pilot, that he did not run against the train as claimed by counsel for appellees, but that the engine ran against him in passing him, and while he was in the act of making the crossing to the alley.

We are of opinion, therefore, that none of the facts relied on as showing negligence on the part of either appellees or McCabe can be said to be undisputed or conclusive, for which reason the trial judge should not have said as a matter of fact or of law that negligence was shown as to either. All the facts should have gone to the jury, under proper instructions, for their determination.

It is a well settled rule that greater care must be used in running trains through a town, and in approaching a crossing in a town, than is required to be exercised in approaching a highway or crossing in the country, because of the passing of persons on the
241 streets and about the railroad track. So it has been held that those in charge of the trains must, under such circumstances, use ordinary care to keep a constant lookout for persons crossing the track and by reducing the speed of the train and giving the customary signals, warn them of approaching danger. (Paducah & M. R. R. Co. *v.* Hachl, 12 Bush, 41; L. & N. R. R. Co. *v.* Creighton, 106 Ky., 42; K. & L. Bridge Co. *v.* Cecil, 14 Ky. Law Rep., 477; Eskridge's Ex'ors. *v.* Cin. N. O. & T. P. Ry. Co., 89 Ky., 375.)

As the intestate was not a trespasser upon appellee's track all the care required by the rule *supra*, should have been exercised by appellee's engineer to avoid injury to him, and if his injuries were caused by the engineer's failure to exercise such care, and not by his own want of ordinary care, appellees would be responsible in damages therefor. At any rate, it was the province of the jury to determine under all the facts whether his own negligence or that of appellees' servant, was the proximate cause of his injuries. We do not think it was an abuse of discretion for the lower court
242 to allow appellees' answer to be filed.

For the reasons indicated the judgment is reversed and cause remanded for a new trial and for further proceedings consistent with the opinion.

Allen D. Cole, A. E. Cole & Son, for Appellant.
Worthington & Cochran, W. H. Wadsworth, for Appellee.

243 And afterwards on the 5th day of January, 1906, at a Court of Appeals held at the Capitol at Frankfort, the following order was entered to wit:

McCabe's Adm'x
v.
M. & B. S. R. R. Co.

Mason.

Came the appellee by counsel and filed a petition and moved the Court to grant a rehearing, which motion is submitted.

(The petition for rehearing mentioned in foregoing order is as follows:)

244 Court of Appeals of Kentucky.

PETER MCCABE'S ADMINISTRATRIX, Appellant,
vs.
MAYSVILLE & BIG SANDY R. CO. & AL., Appellees.

Petition for Rehearing.

May it please the Court:

The appellees, with much diffidence and only from a firm conviction of the justness of their position, come and insist that the conclusion reached by the Court in the opinion, is opposed, not only to the undisputed authority of the text writers, but to former decisions of this Court which have never been overruled, and which authorities no doubt have inadvertently been overlooked by the Court in consideration of this appeal.

In the opinion which reversed the lower Court, it is conceded that at the time and place of the accident which resulted in his death, the decedent McCabe was guilty of contributory negligence
245 which would have been sufficient warrant for the action of the trial court in peremptorily instructing the jury to find for the defendants but for another feature in the case, to-wit, that there was some evidence upon which the jury might have reached the conclusion that the consequences of the decedent's contributory negligence might, by the exercise of ordinary care, have been avoided by the agents of defendants. We quote from the opinion as follows:

"The death of McCabe occurred eight days after his injuries were received. His conduct in crossing from the south track, where he was out of the way of the approaching train, to the north track and in the way of it, would have been incomprehensible but for his own explanation of the matter to the physician and family after he was injured, which was that he discovered the train when it was on or about leaving the curve, but thought it was coming on the south track on which he was then walking, whereupon he left the south track and crossed over to north track to avoid the train and reached the north track as the train struck him. This statement of the accident the physician and others were permitted to relate upon the trial without objection from appellee's counsel, presumably upon the ground that it conduced to prove the intestate guilty of
246 contributory negligence as alleged in appellee's answer. It also appears to have afforded the lower Court sufficient ground for the giving of the peremptory instruction. This conclusion of the Court would prevail with us but for another feature of the case which we think should not be overlooked. That is that there was some evidence which tended to prove that but for the improper rate of speed at which the train was run through the street, and the failure of both the engineer and fireman to keep a lookout ahead of it, the intestate's injuries might have been prevented."

And again: "It may also be said, in view of the testimony of some of the witnesses that no signal was given of the approach of the

train, that if such signals had been given, especially the blowing of the whistle before the train came in sight, it might have kept McCabe off the track until the train passed."

From this it is evident the Court had in mind that there were three grounds upon which it thought there was a possibility that the jury might have reached the said conclusion, to-wit:

1st. The speed of the train.

2nd. The failure to keep a proper lookout.

3rd. The failure to warn by proper signals.

247 We contend, upon the proof as disclosed by this record and the law applicable to it, the decision of the Court is not tenable upon either of said grounds.

Contributory negligence presupposes negligence upon the part of the defendants. See Beach on Contributory Negligence, Sec. 64, South Covington &c. R. Co. *v.* Pelzer, 39 S. W., 496.

If it is in our case conceded that defendants were negligent as to signals and speed, passing the question of lookout for a moment, the decedent was guilty of negligence which contributed to his death, and notwithstanding the said negligence of the defendants as to speed and signals, there can be no recovery on account of such negligence of the defendants, but a recovery can be had only if the defendants under the then existing circumstances and conditions could, by the exercise of ordinary care, have avoided the consequence of decedent's contributory negligence.

The question is not as to what anticipatory steps the defendants might have taken to avoid decedent's negligence, because—

1st. If the speed had been proper and the signals properly
248 given, there would have been no negligence at all, and therefore no contributory negligence.

2nd. One is not bound to anticipate that another will be negligent.

Let us see what is the rule in Kentucky as to this:

In the case of Illinois Central R. Co. *v.* Jones' Adm'r, 90 S. W., 484, this Court held as follows:

"One is not bound to anticipate that another may be negligent."

In South Covington &c. R. Co. *v.* Enslen, 38 S. W., 851, the Court said:

"The operator was not required to anticipate that the driver would suddenly quit his place of safety and take one of danger."

The rule deducible from the cases and the text books may be stated as follows:

"It is unquestionably a correct rule, and, at least, in view of the precedents, not a wholly incorrect way of expressing it, that the subsequent negligence of the plaintiff will be a defense to the prior negligence of the defendant whenever the plaintiff, by the exercise of ordinary care under the circumstances, after the discovery of the negligent act of the defendant, could have escaped the injury."

See Beach on Contributory Negligence, Sec. 58.

249 "Where there was antecedent negligence on the part of the defendants, operating up to the time of the accident, and then contributory negligence on the part of the plaintiff, without which the accident would not have happened, it was held that the

judge was bound to tell the jury that the defendants were not liable unless they could, by a new physical act, irrespective of such antecedent and continuing negligence, have avoided the consequences of the plaintiff's neglect." See Thompson on Negligence, Vol. 1, page 217, Sec. 226.

But a case involving all the elements of this case has been decided by this Court and in line with our connection.

In Meacham's Admr. *v.* L. & N. R. Co., 45 S. W., 363, this Court has under consideration a death case which happened near a depot in a town. The train was running at an "unreasonably high rate of speed." The train men gave no signals of the approach of the train. The decedent was standing in the middle of the track. The train men might have seen him in time. It is evident that these are the very elements of the case at bar, yet this Court held a peremptory instruction to find for defendant was proper. We quote from the opinion.

"The only question presented for decision is whether or not the peremptory instruction should have been given. The evi-
250 dence conduces to show that the train of cars of the appellee was being run at an unreasonably high rate of speed in approaching the depot in the town of Kelly, Ky., and also conduces to show that those in charge of the train could with reasonable diligence have seen the deceased before he was struck by the train. But it is also perfectly manifest that the decedent was guilty of cont-ibutory negligence in standing upon the railroad track and conversing with another party, and so remaining after his attention was called to the fact that the train was approaching, and but for his contributory negligence the unfortunate accident could not and would not have happened. If it be assumed that those in charge of the train saw him upon the track, and did not immediately give warning of its approach, yet it is fair to assume that they had no reasonable grounds to suppose that he would remain upon the track and suffer himself to be struck by the train. It seems clear to us that plaintiff's testimony, taken altogether, failed to show any right to recover, or to have the case submitted to a jury."

The case at bar is infinitely stronger than the one cited, because in the Meacham case the decedent was plainly in a place of danger and could have been seen and warned. In the case at bar the decedent never did get upon the track at all. The proof shows the train was passing him as he got in the place of danger—whether you say the pilot beam or the steps, or both, hit him, makes no difference.

251 In the case of South Covington &c. R. Co. *v.* Enslen, *supra*. This Court had up a case within the populous city of Newport, and upon a public street. A man was driving his delivery wagon along the line of the railroad in Eleventh street. He saw an electric car coming from the east traveling in the same direction he was traveling, and it was approaching at a rapid rate of speed. It gave no signal of its approach. The driver of the wagon attempted to make the crossing at Patterson street, only 95 feet away. He

nearly made it but the car caught the hind wheel of the wagon and destroyed it. This Court said:

"In support of the finding of the jury, we shall assume that no signals were given for the crossing. So, that, conceding the negligence of those managing the car in this particular, the sole question is: Was there such contributory negligence on the part of the driver of the team—which is to be imputed, of course, to the owner—as that, but for it, the accident would not have happened, and should, on that account, the peremptory instruction asked for by the company have been given?

We are clearly of the opinion that the request ought to have been granted. The only need for signals in the operation of a
252 railway is to give warning of the approach of the car, and, if the driver of a vehicle already knows this, he cannot complain of the want of a signal. It could tell him nothing of which he was ignorant. Here the driver testifies that, knowing of the rapid approach of the car behind him, he yet trusted to the belief he started out with, that he could make the crossing safely, and therefore did not use any precaution whatever in driving onto the track. He did not look, but drove blindly in front of the moving and dangerous car. Had he from the start been driving on the track, it would have been the duty of the motorman to have seen him, and, if necessary in order to avoid the collision, to have checked or even stopped his car. As it was, the operator was not required to anticipate that the driver would suddenly quit his place of safety, and take up one of danger. Nor would a prudent driver have done so. This one, impressed with his original belief, miscalculated the chances, and the speculation miscarried by a few seconds."

In the Meacham case it was the duty of the decedent, who knew the train was coming, to get off the track. A failure to do so excused the defendant not only from the high rate of speed and signals, but as to keeping a lookout for him; this last upon the
253 ground that the train men had the right to suppose he would not remain in a dangerous place, and he, knowing of the approach of the train, so remaining, could not complain of their failure to see him.

In the Enslen case the driver saw the rapidly approaching car, but with this knowledge undertook to cross, making a mistake of judgment of a few seconds. The speed of the car, the question of lookout and signals cut no figure.

This Court has decided over and over again, that if one knows of the approach of a train, he cannot complain of absence of signal. In the case of L. & N. R. Co. *vs.* Penrod's Admr., 108 Ky., 172, this Court said:

"The object of giving signals of the approach of a train is to apprise people of its coming. There is some evidence in the record that the deceased was facing the train as it approached him, and, if he knew of the approach of the train, there can be no recovery on the ground that the signals were not given."

That was a city case, and so too see the case of L. & N. R. Co. *vs.* Taaffe's Admr., 106 Ky., 535. See also Helm *vs.* L. & N. R. Co., 33 S. W., 396, South Covington &c. R. Co. *vs.* Enslen, 38 S. W., 850.

So then as to the question of signals when it is conceded that the decedent saw the approach of the train, there was no need
254 of any warning as to what he did know. If he thought the train was upon the track upon which he was walking, surely the giving of signals would not have had any other effect than to hasten his departure from it and thus hasten the disaster.

As to the speed of the train—that was a condition that existed prior to and at the time of the accident, and as we have seen the question is, under those conditions could the train men have avoided the consequences of the situation in which the decedent had placed himself even if they had known it? It is evident if the train had been running a little slower, the decedent would have gotten upon the track and would have been ground to pieces. But whether it was or not, the question, as we have seen, is, could the train men have avoided the accident after they might have discovered the danger under the then conditions.

There is no difference in principle between one guilty of contributory negligence and a trespasser. Both are wrong doers. The only difference in the care of the train men is, that in case of one who is not a trespasser but is guilty of contributory negligence, the train men are bound to use ordinary care, under the conditions as they exist, to avoid the effect of his negligence. In the case of a
255 trespasser, they are bound to use ordinary care only after they actually discover his danger. In both cases the care is measured by the conditions as they exist. Certainly a person who lives on the line of a railroad and is familiar with the trains, who sees the rapidly approaching train coming and walks into it, or before it, cannot be heard to say, "it gave no signals or was running too fast, otherwise you might have avoided my negligence."

As to the question of lookout we earnestly insist:

1st. There is no proof in this record that at the place of the accident there was not a proper lookout; on the contrary it is in evidence that there was; and

2nd. The record conclusively shows that if there had been ever so proper a lookout, this accident would nevertheless have occurred.

The proof by two witnesses was that at a place east of where the accident happened, the engineer and fireman were waiving at Mrs. Bruce's house.

But the administratrix, Mrs. McCabe, testified as follows:

Direct examination:

Ques. 29. How far is her house from the place where your husband was hurt?

256 Ans. I guess it must be pretty near a square.

The engineer admits he had a habit of throwing up his hand in recognition of any salutations, but he testified as follows:

Ques. 24. As you came down through the 5th ward, what were you doing?

Ans. Well, I don't remember now, but I was looking ahead and I think I had my arm on the window sill leaning a little out of the window.

What the engineer was doing a square away does not illustrate what he was doing at the time the danger of McCabe might have been discovered.

The burden of proof was on the plaintiff to show that the train men by the exercise of ordinary care might have seen the danger and avoided it.

The whole case as to the question of lookout turns upon a single proposition, to-wit, where was the train when McCabe stepped from a place of safety into a place of danger? The opinion of the Court says "McCabe made a statement to *his physician* and *others* that he saw the train *as it turned the curve*, which was nearly 800 feet away, and that thinking it was coming on the South track on which
257 he was walking, he *at once* left that track and started for the other."

We have been unable to verify from the record the important statement of the Court in the particulars we have italicised. Only two witnesses testified as to what McCabe said as to this, to-wit, the company's surgeon, Dr. Reed, and R. Carrigan. We quote from the record a part of their testimony:

Dr. J. A. Reed, direct examination:

Ques. 15. Did he tell you how it happened?

Ans. Yes sir. He said he was crossing the railroad and thought the train was on the south track and as he approached the crossing it struck him.

Cross-examination:

Ques. 1. Did he tell you he saw the train coming?

Ans. He said he saw it but thought it was on the south track. He had just left his home to go across the road.

R. Carrigan, direct examination:

Ques. 13. Did you talk to McCabe?

Ans. I did.

Ques. 14. Did he tell you how the accident happened?

Ans. Dr. Reed had just left. I have to make a report when anyone gets hurt and I went there to talk to him. He told me he was walking down the railroad and thought the train was on the
258 same track he was on and he was making for the little crossing at Bruce's alley and by the time he got there the train struck him.

Ques. 15. Did he tell you what part of the train hit him?

Ans. He told me he felt the steps hit him, on the baggage car.

We respectfully submit it is not possible to glean from this the statement of fact, that "he saw the train as it turned the curve" which was 800 feet away, or that, "he at once left the track." It does not appear from McCabe's statement where the train was when he saw it, or when he left the safe track. It does appear where it was when it hit him. The engine and tender and part of the baggage car had passed him when "he felt the steps hit him."

But the eye witnesses make it plain as daylight. Chas. Harring-

ton, who was flagman at the adjacent crossing at Commerce street, testified as follows:

Direct examination:

Ques. 31. Had the engine passed him when you watched him?
Ans. The engine had passed him.
Ques. 32. You watched him until the engine passed him?
259 Ans. Yes sir.
Ques. 33. Was he still on that track then?
Ans. Yes sir, he was still on the track.

Mrs. Wm. Nicholson, direct examination:

Ques. 25. Tell the jury quietly in your own way, just what you saw him do?
Ans. Well, I was sitting there and he was coming down the east bound track.
The Court: Is that the south track?
Attorney for Defendant: It is the one next the hill.
The Witness: All at once the train came along and he looked as though he heard it for he stopped and then again he started to run, but he stopped again, and by that time the engine passed and he was on the platform as you go across the north track and as the engine passed he took a straight run and he ran right into it. The engine was way passed him and it was the baggage coach step that hit him.
Ques. 26. Did you see that?
Ans. Yes sir, I saw it.
Ques. 27. Did your brother-in-law, Mr. Jas. V. Hoops see that?
Ans. Yes sir, he saw it too.

Mrs. George Little, direct examination:

260 Ques. 13. Did you notice Mr. McCabe?
Ans. Yes sir.
Ques. 14. Where was he when you first saw him?
Ans. In the middle of the track.
Ques. 21. How much of the train did you see pass him?
Ans. The engine and the baggage car I saw pass him.
Ques. 22. Could you see it hit him at all?
Ans. No sir.

This witness shows she was on the opposite side of the track, at the Commerce street crossing.

Mr. James V. Hoops, direct examination:

Ques. 19. Did you see Peter McCabe?
Ans. Yes sir.
Ques. 20. When did you first see him that you now remember?
Ans. Just as I came across the railroad crossing I saw Mr. McCabe down at the foot of his steps where his home was, coming down this way, coming down the east bound track, and as I was going up the

steps I heard the train whistle above there, I suppose about
261 the brick yard some place. He stopped and looked and turned around and looked back; then he started on, he started on down the track. I suppose he got within 30 feet of the crossing and started to run, but as he got on the crossing the engine passed him and the hind end of the baggage car struck him and he fell down between the tracks.

This witness and Mrs. Nicholson were almost directly opposite the place of the accident.

Al Maddox said he saw McCabe walking on the east bound tract.

Direct examination:

Ques. 20. What did you see Mr. McCabe do, did you see him come out of his house?

Ans. No sir, I did not. He was walking down the track half way between his house and the platform where it crosses Bruce's alley, when I saw him.

Ques. 21. Could you see him when he was hit at all?

Ans. Yes sir. I could see him standing on the platform.

Ques. 22. Can you tell the jury what hit him?

Ans. The step on the third car struck McCabe. The first was an express car, the second a small mail car with no steps on it, and the third was a baggage car and coach combined, with the steps on the rear end of it.

262 Ques. 23. Could you tell how he got into the train at all?

Ans. He walked into the train.

Ques. 24. Did you see him do it?

Ans. Yes sir, you could see the man walking into it.

U. G. Bailey says he was walking east on the railroad on the same track McCabe was on, who was facing him. It was the east bound track that he saw McCabe on.

Ques. 26. Tell the jury now what happened just as near as you can.

Ans. Well he was coming, just as I said, toward me; when he got on the crossing I seen him start toward the train. I then looked down.

Ques. 27. How much of the train had passed him at that time, if any?

Ans. I know that the engine had passed him and then when I looked up again, I seen the gentleman in the gutter.

Ques. 28. Have you any information as to what hit him?

Ans. It is my opinion that the step struck him.

Here are six eye witnesses who say the engine at least had
263 passed McCabe, and no less than three eye witnesses who saw him walk into the side of that train. In addition we have his own statement that it was the baggage car steps which hit him. Why should a jury be allowed to speculate as to anything about it? The character of the wounds are just such as the steps would make. It is a reasonable position that the pilot beam, which accord-

ing to the testimony is a foot square, would, at the speed of that train, have knocked McCabe many feet and clear of everything. It is unreasonable to say that he could have been hit by the pilot beam and the steps of the baggage car, the third car back from the engine and tender. He walked into the steps and fell down in the gutter from the sidling blow.

But he was on the south track as the engine got to him at least. The tracks are thirteen feet apart from centre to centre; the cars project two and a half to three feet; it only took a step or two from the safe place to the dangerous one.

If he might have been seen as the train approached then, this undisputed proof shows he was not in danger. Under the proof at any rate of speed, his danger must have been while the train was some distance away and not when the engine was passing, in
264 order that the train might be stopped. If we assume it was the pilot beam that hit McCabe, yet it is apparent he was not on the track at all and the engine must have been passing as he stepped into the dangerous place. There is no proof that McCabe stood there until the engine reached him. But one conclusion can be drawn from the testimony. He walked into a place of danger and no lookout could have avoided the consequences. If then it does not appear that a proper lookout would have avoided the accident, how can it be said that the failure to keep a lookout was the proximate cause of that accident?

We earnestly submit that the law as laid down by this Court and hereinbefore cited, justified the trial Court in his action in directing a verdict for the defendants and we respectfully ask the Court to grant a rehearing of this appeal and to affirm the judgment.

W. H. WADSWORTH,
For Appellees.

WORTHINGTON & COCHRAN,
Of Counsel.

265 *Points and Authorities Cited.*

One who, while in a place of safety, sees a rapidly approaching train and attempts to cross the track and is injured, cannot complain of the speed of the train or the absence of signals, nor of the failure to keep a proper lookout, unless it appears that such failure was the proximate cause of the injury.

Beach on Contributory Negligence, Secs. 58 and 64.
Thompson on Negligence, Vol. 1, p. 217, Sec. 226.
South Covington &c. Ry. Co. *v.* Pelzer, 39 S. W., 496.
Illinois Central R. Co. *v.* Jones Admr., 80 S. W., 484.
South Covington &c. Ry. Co. *v.* Enslen, 38 S. W., 851.
Meacham's Admrs. *v.* L. & N. R. Co., 45 S. W., 363.
L. & N. R. Co. *v.* Penrod's Admr., 108 Ky., 172.
L. & N. R. Co. *v.* Taaffe's Admr., 106 Ky., 135.
Helm *v.* L. & N. R. Co., 33 S. W., 396.

266 And afterwards on the 17th day of January, 1906, at a Court of Appeals held at the Capitol at Frankfort the following order was entered—

McCABE'S ADM'X
v.
M. & B. S. R. R. Co.

Mason.

The Court being sufficiently advised, it is considered that appellees' petition for rehearing be and the same is overruled.

1–12 THE COMMONWEALTH OF KENTUCKY:

The Court of Appeals.

Pleas Before the Honorable the Court of Appeals of Kentucky at the Capitol, at Frankfort, on the 1st Day of March, 1907.

MAYSVILLE AND BIG SANDY RAILROAD COMPANY, ETC., Appellants,
v.
PETER McCABE'S ADM'X, Appellee.

Appeal from Mason Circuit Court.

Be it remembered that the appellant by its counsel on the 25th day of October, 1906, filed in the office of the Clerk of the Court of Appeals a transcript of the record, and which is in words as follows—

* * * * * * *

13 *Order Impaneling Jury, &c.*

This day came the parties; and thereupon came the following jury, to-wit: Joe Duncan, J. D. Raymond, W. H. Yancey, R. P. Gault, C. C. Degman, A. D. Dickson, A. P. Gooding, Samuel McNutt, Con. Flanagan, D. E. Bullock, Henry Dietrich and Joseph Armbruster, who were duly impaneled and sworn to try the issue, and not having fully heard the evidence are continued until 9 o'clock to-morrow morning, and are allowed to disperse after receiving the usual charge from the court.

(At a court held as aforesaid on the 8th day of September, 1906.)

Order Noting Appearance of Jury.

Again came the parties, and the jury empaneled and sworn herein on yesterday appeared, and took their seats, and not having fully heard the parties are continued until 9 o'clock Monday morning, and are allowed to disperse after receiving the usual charge from the court.

(At a court held as aforesaid on the 10th day of September, 1906:)

14 *Noting Appearance of Jury.*

Again came the parties, and the jury empaneled and sworn herein on a former day of the present term appeared and took their seats, and not having fully heard the parties are continued until 9 o'clock to-morrow morning, and are allowed to disperse after receiving the usual charge from the court.

(At a court held as aforesaid on the 11th day of September, 1906:)

Noting Appearance of Jury.

Again came the parties, and the jury empaneled and sworn herein on a former day of the present term appeared and took their seats, and having fully heard the evidence and argument of counsel, returned the following verdict:

"We, the jury, find for the plaintiff the sum of twenty five hundred dollars damages.

A. P. GOODING, *Foreman.*"

Judgment.

Wherefore, it is adjudged that plaintiff recover of the defendants the sum of twenty-five hundred dollars, with six per cent. interest thereon from the 11th day of September, 1906, until paid, and her costs herein expended.

* * * * * * *

15 At a court held as aforesaid on the 12th day of September, 1906, the following orders were entered:

Order Filing & Overruling Motion for New Trial, &c.

Defendants produced their written motion and grounds for a new trial herein, and the same are ordered filed. And being submitted, the court overrules said motion, and refuses to grant a new trial, to which defendants, and each of them, object and except, and pray an appeal to the Court of Appeals, which is granted.

Motion & Grounds for a New Trial.

The defendants come and move the court to set aside the verdict and judgment herein rendered against them, and each of
16 them, and to grant them, and each of them, a new trial of this action, and they herewith present and file in support of said motion, these, their respective reasons and grounds therefor, as follows, to-wit:

Motion & Grounds for a New Trial.

1st. The court erred to the prejudice of the defendants, and each of them, in not sustaining their motion for a continuance of this case.

2nd. The court erred to the prejudice of the defendants, and each of them, in permitting certain illegal, immaterial and incompetent and irrelevant testimony to go to the jury offered by plaintiff, and to the introduction of which testimony in each instance the defendants objected, and to the ruling of the court permitting the same to go to the jury, in each instance, excepted and still except.

3d. The court erred to the prejudice of the defendants, and each of them, in refusing to admit to the jury certain legal, competent, relevant and material evidence offered by defendants in their behalf, and to which rulings of the court in each instance the defendants excepted and still except.

4th. The court erred to the prejudice of the defendants in not sustaining their motion for a peremptory instruction at the end of all the testimony.

17 5th. The court erred to the prejudice of the defendants, and each of them, in giving to the jury instructions in typewriting, numbers 1, 2, 3, 4, 5, 6 and 7, to the giving of each of which instructions the defendants objected beforehand, and to the ruling of the court overruling said objections and giving said instructions the defendants in each instance excepted and still except.

6th. The court erred to the prejudice of the defendants, and each of them, in refusing to give to the jury on motion of defendants, the following instructions:

Instruction "A," in the handwriting of W. H. Wadsworth, Esq., marked "refused B. S. G."

Instructions "B" and "C" in the handwriting of E. L. Worthington, Esq., marked "refused B. S. G."

Instructions "E, F, G, H, I and J," in typewriting, and each of them marked "refused B. S. G."

To the ruling of the court in each instance in refusing to give each instruction the defendants excepted and still except.

7th. The verdict of the jury is not sustained by any evidence.

18–263 8th. The verdict of the jury is flagrantly against the great weight of the evidence and palpably so, and was evidently given under the influence of passion and prejudice against the defendants and each of them.

9th. The verdict is contrary to law.

10th. The verdict is excessive and is palpably the result of passion and prejudice.

W. H. WADSWORTH,
WORTHINGTON & COCHRAN,
For Defendants.

* * * * * * *

264 And afterwards at a Court of Appeals held at the Capitol at Frankfort, on the 15th day of February, 1907, the following order was entered:

M. & B. S. R. R. Co.,
v.
McCabe's, Adm'x.

Mason.

This Case is Ordered to be Submitted.

Be it remembered that on the 1st day of March 1907, at a Court of Appeals held at the Capitol at Frankfort, the following order was entered:

Maysville and Big Sandy Railroad Co., etc., Appellants,
v.
Peter McCabe's Adm'x, Appellee.

Appeal from Mason Circuit Court.

The Court being sufficiently advised, it seems to them there is no error in the judgment herein.

It is therefore considered that said judgment be affirmed, and that the appellee recover of the appellant ten per cent. damages on amount of the judgment superseded herein which is ordered certified to said court.

It is further considered that the appellee recover of the
265 appellant her costs herein expended.

(And on said date the Court delivered the following opinion)

266 Court of Appeals of Kentucky.

March 1, 1907.

Maysville and Big Sandy Railroad Co., etc., Appellants,
vs.
Peter McCabe's Administratrix, Appellee.

Affirmed.

Opinion of the Court by Judge Barker:

This is the third appeal of this case. After it was instituted the defendants filed a petition under the federal statute to remove it to the federal court on the ground of diversity of citizenship, and this motion was sustained by the circuit court. From the order of transfer the plaintiff appealed, and the judgment was reversed and the

case sent back for trial. The opinion on the first appeal is
267 to be found in 23 Ky. Law Rep., 2328. Upon the return of the case, a trial was had on the merits, with the result that at the close of all the testimony a motion for a peremptory instruction to the jury to find in defendants' favor was sustained. From this judgment the plaintiff prosecuted a second appeal, and it was reversed for reasons given in an opinion to be found in 28 Ky. Law Rep., 536. Upon the return of the case to the circuit court for proceedings consistent with the opinion, a trial was again had on the merits, with the result that the jury returned a verdict in favor of the plaintiff (appellee) for two thousand, five hundred dollars; and from the judgment based upon this verdict the defendants (appellants) appeal. The full statement of the facts in the former opinion on the merits renders it unnecessary that we should give a detailed statement of them here.

The appellants now insist that the facts elicited upon the last trial were substantially different from those shown on the pre-
268 ceding one, and that they were entitled to a peremptory instruction to the jury to find for them. To this conclusion we can not agree. A careful reading of the evidence adduced on both trials convinces us that if there was any difference in appellants' right to a peremptory instruction on the trials had on the merits, it was in favor of the first, rather than the last. In other words, the evidence in favor of the right of plaintiff to submit her case to the jury, if there was any difference, was stronger upon the last trial than upon the one which preceded it. Having decided on the preceding appeal that the evidence adduced in favor of the plaintiff entitled her to go to the jury, this question (the facts being substantially the same) is settled for the purposes of this appeal, and we can not, therefore, enter into a discussion now as to whether or not that conclusion was right or wrong.

Before the second trial, appellants pleaded the transfer
269 of the case to the federal court and its exclusive jurisdiction to try the issues between them and the plaintiff in bar of a further prosecution of the case in the state court. This plea was held bad by the trial court, and the ruling was correct. The question was necessarily involved on the appeal from the order of transfer; for if the state court lost its jurisdiction of the case by the erroneous order of transfer, the judgment making it should not have been reversed. The reversal of the order of transfer necessarily adjudicated the question now sought to be made by the plea under discussion, and the matter is not now open for retrial.

The only serious criticism of the instructions given by the court is directed to No. 3, which is as follows:

"The court further instructs the jury that if they believe from all the evidence that the deceased, Peter McCabe, was, on the date of the accident, placed suddenly and unexpectedly in a dangerous
270 position, or what to him reasonably appeared to be a dangerous position, if he was so placed and was so placed by the failure of the defendants, their agents and servants to give reasonable warning of the approach of the train, or by their running said train

substantially at a rate of speed greater than ordinary care for the safety of others would allow, then he was not guilty of contributory negligence if he did not adopt the best means of escape, but made an error of judgment as to the best course to pursue; all that was required of him, under such circumstances, if it was under such circumstances he acted, being to act as a person of ordinary judgment and prudence would have done, if placed in the same situation."

We think this instruction substantially gave the law of the issue to which it was directed. The evidence of the plaintiff tended to show that the train which killed the decedent was being run through one of the streets of Maysville at a rate of from twenty-five to forty miles an hour. The company maintained a double track
271 along the streets upon which the decedent was walking just before he was hurt. The train was approaching behind him on the track upon which he was not walking, and while it may be conceded that he saw it before it reached him, and that he was safe if he remained where he then was, yet if it was coming at the very unreasonable rate of from twenty-five to forty miles an hour, this of itself was calculated to so perturb and frighten the old man as to make it impossible for him to tell whether he was on the track upon which the train was coming, or not; and if in his great confusion and fright he rushed from a place of safety into one of danger, this act could not be considered contributory negligence. The track being in the public highway of a city, the decedent was not a trespasser. When he saw the train coming he had a right to assume that it would approach at a proper rate, and if it had been running at a reasonable rate he probably could have reached the crossing in time to leave the track in safety. It is a matter of common knowledge that one standing immediately in front of a coming train can tell nothing of its rate of speed until it comes quite close.
272 Now, when the decedent saw the train approaching, he being immediately in front of it and unable to judge its rate of speed, had a right to suppose that it was coming at a reasonable rate through one of the public thoroughfares of the city. But if, when it came close, he ascertained that it was coming at so furious a rate that he was in great danger of being run over, it was not unnatural that he should be thrown into such a state of nervous fright as to be incapable of judging what he should do to reach a place of safety. The question, whether the decedent was so frightened by the supposed furious rate of speed at which the train was being run that he was rendered incapable of selecting a place of safety, was one which the appellee had a right to submit to the jury. And this phase of the case comes within the reasoning of South Covington and Cincinnati Street Railway Co. *v.* Ware, 84 Ky., 267, and the instruction complained of, which presented it to the jury, is supported by the opinion delivered in that case.

273 Upon the whole case, we are able to perceive no substantial error in the record, and the judgment is, therefore, affirmed.

A. D. COLE,
For Appellee.

WORTHINGTON & COCHRAN,
W. H. WADSWORTH,
For Appellants.

274 Be it remembered that on the 2nd day of April, 1907, the appellant by its counsel filed in the office of the Clerk of the Court of Appeals, a petition for rehearing.

Be it remembered that on the 8th day of April, 1907, at a Court of Appeals held at the Capitol at Frankfort, the following order was entered to-wit:

M. & B. S. R. R. Co.
v.
McCabe's Adm'x.

Mason.

Came the appellant by counsel and on motion the petition filed in the office of the Clerk of this court is noted of record, and moved the Court to grant a rehearing, which motion is submitted.

(The petition mentioned in foregoing order is in words and figures as follows, to-wit:)

275 No. 3.

Court of Appeals of Kentucky.

Maysville & Big Sandy Railroad Company and Chesapeake & Ohio Railway Company, Appellants,
vs.
Peter McCabe's Administratrix, Appellee.

Petition for Rehearing.

May it please the Court:

A rehearing of this case is respectfully asked.

The court in its opinion says:

"Before the second trial, appellants pleaded the transfer of the case to the federal court and its exclusive jurisdiction to try the issues between them and the plaintiff in bar of a further prosecution of the cause in the state court. This plea was held bad by the trial court, and the ruling was correct. The question was necessarily involved on the appeal from the order of transfer; for
276 if the state court lost its jurisdiction of the case by the erroneous order of transfer, the judgment making it should not have been reversed. The reversal of the order of transfer necessarily adjudicated the question now sought to be made by the plea under discussion, and the matter is now open for retrial."

This court decided on the first appeal herein that the suit was not a removable one, and on that ground reversed the judgment of the Mason Circuit Court ordering it to be removed. No question was made, or could have been made, on that appeal, as to what effect should be given to the judgment of the United States Circuit Court for the Eastern District of Kentucky overruling appellee's

motion to remand the case to the Mason Circuit Court and its subsequent judgment dismissing the action. For the motion to remand was not made until after this court had held that the suit was not a removable one.

In considering whether said judgment of the United States Court is a bar to the further prosecution of the action in the Mason Circuit Court, we assume, for the sake of the argument, that the United States Court erred in deciding that the case was a removable one, and that the question whether the cause was removed on the filing of the petition and bond in the Mason Circuit Court is no
277 longer an open one, but was settled by the opinion of this court on the former appeal.

But the fact remains that the United States Court did decide that the case was a removable one, and that it had been properly removed to that court, and this decision was made in passing on the motion, made in that court by appellee, to remand the case to the Mason Circuit Court.

The real question now involved is, not whether that judgment of the United States Court was right or wrong, but is it binding on appellee as long as it remains unreversed. In other words, is the judgment of the United States Court erroneous merely, or is it void? We assume that the former opinion herein settles the question in this court that the judgment of the United States Court is erroneous. But this court has not yet decided, nor has the question been heretofore presented so that this court could decide it, that the judgment of the United States Court was absolutely void.

The Supreme Court has several times held in unmistakable terms that the judgment of a state court refusing to grant a removal, in a case where a removal should have been granted, was not only voidable but absolutely void. Kern *v.* Huidekoper, 103 U. S. 485. It has just as pointedly decided that the judgment of a
278 United States — to which an action has been wrongfully removed, is not void but erroneous merely, and binding on the parties until reversed. Dowell *v.* Applegate, 152 U. S. 340.

Whether a different effect should be given to the judgment of a state court that a cause is not removable from what is given to judgment of a federal court that a cause is removable, is a question that persons might differ about. But the fact is that the Supreme Court has settled the question, that the former judgment, if erroneous, is void, and the latter, if erroneous, is not void, but binding until reversed. The reason for the distinction doubtless is that the Act of Congress giving the right of removal in any case, expressly gives to the United States Court jurisdiction to determine whether a suit is removable, and makes its judgment conclusive where it decides against the right of removal, and impliedly gives a right of appeal from it where it decides that the case is removable. The Act of Congress confers no such jurisdiction on the state courts.

To illustrate: Suppose in the present case, this court had agreed with the Mason Circuit Court that the cause was a removable
279 one, and had affirmed its judgment, and that the federal court had held it was not a removable case and had remanded it to the state court; then if the judgment of the federal court is

not binding on the state court, appellee could not get her suit tried in any court. She could not appeal from the judgment of the federal court remanding the case because the Act of Congress makes the judgment remanding the case final and not subject to appeal. She could not appeal from the judgment of this court to the Supreme Court of the United States, because that Court would be bound to decide, as they have already said in Missouri Pacific Ry. Co. *v.* Fitzgerald, 160 U. S. 556, that "it was the intention of Congress to make the judgment of the circuit court, remanding a cause to the state court final and conclusive," and that "the use of the words 'such remand shall be immediately carried into execution,' in addition to the prohibition of appeal and writ of error, is strongly indicative of an intent to suppress further prolongation of the controversy by whatever process."

Again, suppose at the trial in the federal court appellee had obtained a judgment against appellants for twenty-five hundred dollars. Could she have collected both judgments, the one for twenty-
five hundred dollars given her in the state court, and the one
280 for twenty-five hundred dollars given her in the federal court? Obviously she could, unless the Act of Congress has given jurisdiction to one of those courts to pronounce a judgment which is binding on the other until reversed on appeal. And that we respectfully submit the Removal Act of 1887-'8 does do. The Supreme Court says in Dowell *v.* Applegate, 152 U. S. 327:

"If the circuit court kept the case when it ought to have been remanded, * * * its final decree in the suit could have been reversed, on appeal, as erroneous, but the decree would not have been a nullity. To determine whether the suit was removable in whole or in part, was certainly within the power of the circuit court. The decision of that question was the exercise and the rightful exercise of jurisdiction, no matter whether in favor of or against taking the cause. Whether its decision was right, in this or any other respect, was to be finally determined by this court on appeal."

It is respectfully submitted that the judgment of the United States Court dismissing this action, whether that judgment was right or wrong, is binding on appellee until it is reversed; that therefore, being a judgment on the merits, it is a bar to any further prosecu-
tion of a suit on the same cause of action in any other
281–311 court; and that this court in failing to so adjudge, has failed to give full force and credit to a judgment of a court of the United States.

A rehearing is respectfully asked for, and a reversal of the judgment below.

WORTHINGTON & COCHRAN,
For Appellants.

W. H. WADSWORTH,
Of Counsel.

* * * * * * *

312 And afterwards at a Court of Appeals held at the Capitol at Frankfort on the 10th day of April, 1907, the following order was entered to-wit:

M. & B. S. R. R. Co.
v.
McCabe's Adm'x.

Mason.

The Court being sufficiently advised it is considered that the motion and petition of appellee for a rehearing be and the same is overruled.

Be it remembered that on the 19th day of April, A. D. 1907, there was filed in the office of the Clerk of the Court of Appeals, an Assignment of Errors, and which is hereto attached as follows:

313 Supreme Court of the United States.

Maysville and Big Sandy Railroad Company and The Chesapeake and Ohio Railway Company, Plaintiffs in Error.
vs.
Emma R. McCabe, Administratrix of Peter McCabe, Deceased, Defendant in Error.

Assignment of Errors.

Maysville and Big Sandy Railroad Company and The Chesapeake and Ohio Railway Company, plaintiffs in error in the above entitled cause, complain of the judgment rendered herein by the Court of Appeals of Kentucky, and for error therein assign the following:

1st. The court erred in affirming the judgment of the Mason Circuit Court, whereas it should have reversed the same with directions not to proceed in said cause.

2d. The court erred in holding in substance and effect that The Chesapeake and Ohio Railway Company had no right under the Constitution and laws of the United States, to remove the cause pending in the Mason Circuit Court against it and the Maysville and Big Sandy Railroad Company, to the Circuit Court of the United States, for the Eastern District of Kentucky, and that the said The Chesapeake and Ohio Railway Company had no right under the constitution and laws of the United States to have said cause removed as aforesaid.

3d. The court erred in holding that the Mason Circuit Court had any right to proceed further in the said cause after the petition to remove the same on behalf of The Chesapeake and Ohio Railway Company had been filed in the said Mason Circuit Court.

4th. The court erred in holding that the proceedings in the Mason Circuit Court after the filing of the petition of The Chesapeake and Ohio Railway Company for the removal of the said cause to the

Circuit Court of the United States for the Eastern District of Kentucky, were not void and of no force and effect.

5th. The court erred in deciding that the judgment of said Circuit Court of the United States for the Eastern District of Kentucky refusing to remand said cause to the Mason Circuit Court and
314 overruling the motion of defendant in error to remand the same, was not binding upon the Mason Circuit Court and the Court of Appeals of Kentucky.

6th. The court erred in holding that the final judgment dismissing the petition of defendant in error, rendered in said cause by the said Circuit Court of the United States for the Eastern District of Kentucky, was not a bar to further proceedings in said cause in said Mason Circuit Court.

7th. The court failed and refused to give full force and effect to said judgment of the Circuit Court of the United States for the Eastern District of Kentucky, dismissing the petition of defendant in error against plaintiffs in error, Maysville and Big Sandy Railroad Company and The Chesapeake and Ohio Railway Company.

W. H. WADSWORTH,
WORTHINGTON & COCHRAN,
Attorneys for Plaintiffs in Error, Maysville and Big Sandy Railroad Company and The Chesapeake and Ohio Railway Company.

Filed Apr. 19, 1907.
J. MORGAN CHINN, *C. C. A.*

315 Be it remembered that on the said date there was also filed in the Clerk's office of the Court of Appeals, a Writ of Error from the United States Supreme Court, and the order allowing same, and which is hereto attached as follows:

316 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable, the Judges of the Court of Appeals of the State of Kentucky, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea before you, or some of you, being the highest court of law or equity of the State in which a decision could be had in the suit between The Chesapeake and Ohio Railway Company and the Maysville and Big Sandy Railroad Company, appellants, and Emma R. McCabe, administratrix of Peter McCabe, deceased, appellee, wherein was drawn in question a right and authority existing under the laws of the United States, and the decision was against the exercise of such right and authority, and wherein was drawn in question the construction of a statute of the United States and the decision was against the title, right, privilege or exemption, specially set up and claimed, under said statute of the United States, a manifest error hath happened to the great damage of the said. The Chesapeake and Ohio Railway Company and Maysville and Big

Sandy Railroad Company, as by their complaint appears; We, being willing that error, if any hath happened, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have same at Washington within thirty days from the date hereof, in the said Supreme Court of the United States, to be then and there held, that, the record and proceedings aforesaid
317 being inspected, the said Supreme Court may cause further to be done therein to correct that error what of rght and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court of the United States, this, the 19th day of April, in the year of our Lord, One Thousand Nine Hundred and Seven.

[Seal 6th Circuit Court, Eastern Ky. Dis., U. S. of America.]

WALTER G. CHAPMAN,
Clerk of the Circuit Court of the United States for the Eastern District of Kentucky, at Frankfort.

Allowed April 19th, 1907.

ED. C. O'REAR,
Chief Justice Court of Appeals of Ky.

Filed Apr. 19, 1907.

J. MORGAN CHINN, *C. C. A.*

318 Be it remembered that there was filed in the office of the Clerk of the Court of Appeals on the 22nd day of April, 1907, the Original Citation, and proof of service endorsed thereon and which is as follows—

319 UNITED STATES OF AMERICA, *ss:*

The President of the United States to Emma R. McCabe, administratrix of Peter McCabe, deceased, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington, in the District of Columbia, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the Court of Appeals of the State of Kentucky, wherein the Maysville and Big Sandy Railroad Company and The Chesapeake and Ohio Railway Company are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this April 19th in the year of our Lord, One Thousand Nine Hundred and Seven.

ED. C. O'REAR,
Chief Justice Court of Appeals of Kentucky.

I hereby accept service of the above citation on this 20th day of April, 1907.

ALLAN D. COLE,
Counsel for Emma R. McCabe, Adm'x of Peter McCabe, Deceased, Def't in Error.

Field Apr. 22, 1907.
J. MORGAN CHINN, *C. C. A.*

320 And be it remembered that on the 19th day of April, 1907, there was filed in the office of the Clerk of the Court of Appeals, a Writ of Error Bond and which is in words and figures as follows, to-wit:

321 Court of Appeals of Kentucky.

MAYSVILLE AND BIG SANDY RAILROAD COMPANY and THE CHESAPEAKE AND OHIO RAILWAY COMPANY, Appellants,
vs.
EMMA R. MCCABE, Administratrix of Peter McCabe, Deceased, Appellee.

Bond.

Know all men by these presents, That We, The Chesapeake and Ohio Railway Company and Maysville and Big Sandy Railroad Company, principals, and William H. Wadsworth as surety, are held and firmly bound unto Emma R. McCabe, Administratrix of Peter McCabe, deceased, in the sum of Five Thousand Dollars to be paid to the said obligee herein; to which payment well and truly to be made, we bind ourselves, jointly and severally, and each of our executors, heirs successors and administrators, firmly by these presents.

Sealed with our seals and dated this 19th day of April, 1907.

322 Whereas, the above named The Chesapeake and Ohio Railway Company and Maysville and Big Sandy Railroad Company, have prosecuted a writ of error from the Supreme Court of the United States to reverse the judgment rendered in the above entitled cause by the Court of Appeals of Kentucky, the said writ of error to operate as a supersedeas, now therefore, the condition of this obligation is such that if the above named The Chesapeake and Ohio Railway Company and Maysville and Big Sandy Railroad Company shall prosecute their said writ of error to effect and answer to the judgment herein rendered, damages and all costs, if they shall fail to

make good their plea, then this obligation shall be void; otherwise, the same shall be and remain in full force and virtue.

THE CHESAPEAKE & OHIO RAILWAY COMPANY, [SEAL.]
MAYSVILLE & BIG SANDY RAILROAD COMPANY, [SEAL.]
By W. H. WADSWORTH, *Att'y.* [SEAL.]
W. H. WADSWORTH. [SEAL.]

Approved April 19, 1907.
ED. C. O'REAR,
Chief Justice Court of Appeals of Kentucky.

Filed Apr. 19, 1907.
J. MORGAN CHINN, *C. C. A.*

323 & 324 THE COMMONWEALTH OF KENTUCKY:

The Court of Appeals.

In obedience to the command of the within Writ of Error, I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the complete record and proceedings in the case named in said Writ, with all things concerning same.

In Testimony whereof I have hereunto set my hand and caused my official seal to be hereunto affixed. Done at the Capitol at Frankfort, this the 30 day of April A. D. One Thousand Nine Hundred and Seven.

[Seal Kentucky Court of Appeals.]

J. MORGAN CHINN,
Clerk Court of Appeals of Kentucky.

C. C. A. Fee for Transcript $175.00.

325 Supreme Court of the United States.

MAYSVILLE AND BIG SANDY RAILROAD COMPANY and THE CHESAPEAKE AND OHIO RAILWAY COMPANY, Plaintiffs in Error,
vs.
EMMA R. MCCABE, Administratrix of Peter McCabe, Deceased, Defendant in Error.

Statement Pursuant to Sub-Division 9 of Rule 10 of the Supreme Court.

Now comes Maysville and Big Sandy Railroad Company and The Chesapeake and Ohio Railway Company, plaintiffs in error in the above entitled cause, and state, pursuant to sub-division 9 of Rule 10 of the Supreme Court, that the errors on which they intend to rely on this writ of error are as follows:

1st. The court erred in affirming the judgment of the Mason Circuit Court, whereas it should have reversed the same with directions not to proceed in said cause.

2d. The court erred in holding in substance and effect that The Chesapeake and Ohio Railway Company had no right under the Constitution and laws of the United States, to remove the cause pending in the Mason Circuit Court against it and the Maysville and Big Sandy Railroad Company, to the Circuit Court of the United States, for the Eastern District of Kentucky, and that the said The Chesapeake and Ohio Railway Company had no right under the Constitution and laws of the United States to have said cause removed as aforesaid.

3d. The court erred in holding that the Mason Circuit Court had any right to proceed further in the said cause after the petition to remove the same on behalf of The Chesapeake and Ohio Railway Company had been filed in the said Mason Circuit Court.

326 *4th.* The court erred in holding that the proceedings in the Mason Circuit Court after the filing of the petition of The Chesapeake and Ohio Railway Company for the removal of the said cause to the Circuit Court of the United States for the Eastern District of Kentucky, were not void and of no force and effect.

5th. The court erred in deciding that the judgment of said Circuit Court of the United States for the Eastern District of Kentucky refusing to remand said cause to the Mason Circuit Court and overruling the motion of defendant in error to remand the same, was not binding upon the Mason Circuit Court and the Court of Appeals of Kentucky.

6th. The court erred in holding that the final judgment dismissing the petition of defendant in error, rendered in said cause by the said Circuit Court of the United States for the Eastern District of Kentucky, was not a bar to further proceedings in said cause in said Mason Circuit Court.

7th. The court failed and refused to give full force and effect to said judgment of the Circuit Court of the United States for the Eastern District of Kentucky, dismissing the petition of defendant in error against plaintiffs in error, Maysville and Big Sandy Railroad Company and The Chesapeake and Ohio Railway Company.

The parts of the record which said plaintiffs in error think necessary for the consideration of said errors are as follows:

From Transcript No. 1.

The original petition of defendant in error filed in the Clerk's office of the Mason Circuit Court September 27, 1901, and clerk's order noting filing of same, pages 2 to 10 inclusive.

The summons thereon and return, pages 10 and 11.

The amended petition filed October 7, 1901, pages 12 to 14.

Amended petition filed November 4, 1901, pages 15 to 22.

327 Summons and return thereon, pages 22 to 24.

The order of the Mason Circuit Court filing petition for removal of plaintiff in error, The Chesapeake and Ohio Railway Company, page 24.

Said petition for removal, pages 24 to 39.

Bond on removal, pages 40 to 43.

Order filing demurrer of defendant in error to said petition for removal, page 43.

Said demurrer, pages 43 to 44.

Order overruling said demurrer, page 44.

Order of Mason Circuit Court removing this cause to the United States Circuit Court for the Eastern District of Kentucky and granting appeal therefrom, pages 44 and 45.

Motion of defendant in error to set aside the order directing the removal and order filing same, page 46.

Order overruling said motion to set aside said order, page 47.

Judgment of the Court of Appeals of Kentucky reversing the judgment of the Mason Circuit Court ordering the removal, pages 61 and 62.

Opinion of the Court of Appeals of Kentucky on said judgment of reversal, pages 63 to 82.

328 Order of said Court of Appeals filing petition of plaintiffs in error for a rehearing and motion therefor, page 83.

Said petition for rehearing, pages 84 to 103.

Response by defendant in error to said petition, pages 103 to 106.

Order of Court of Appeals overruling petition for rehearing.

Order of said court filing petition and motion of defendant in error to extend the opinion herein, page 107.

Said petition for extension, pages 108 to 111.

Order of Court of Appeals overruling said petition, page 112.

From Transcript No. 2.

Amended petition of defendant in error and order of Mason Circuit Court filing same, pages 4 and 5.

The order showing the producing and offering to file the answer of plaintiffs in error and the objection of defendants in error and the action of the court taking time, page 16.

The order refusing to allow said pleading to be filed and the exception thereto and the order making same a part of the record in this case and all the orders made at that time and copied on

329 pages 18 and 19 and 20.

Said answer of plaintiffs in error, so made a part of the record, pages 20 to 23.

Amended petition of defendant in error, page 23 to 25.

Amended answer of plaintiffs in error and order filing same, pages 26 to 38.

Reply of defendant in error, and order filing same, pages 38 to 39.

Order made December 20, 1904, showing that plaintiffs in error produced and offered to file their amended answer, defendant in error's objection thereto, order sustaining said objection and refusing to permit said amended answer to be filed, and plaintiffs in error's objection thereto and the order on their motion making said amended answer a part of the record, page 39.

Said amended answer and exhibits thereto so made a part of the record, pages 39 to 50.

Order showing production by defendant in error of its amended petition and offer to file same and refusal of the court to permit same to be filed and making it a part of the record, page 51.

330 Said amended petition, pages 51 and 52.

Order empaneling jury and its verdict and judgment thereon, pages 54 to 56.

Motion and grounds for new trial by defendant in error and order filing and overruling same and granting her an appeal to the Court of Appeals of Kentucky, pages 56 and 57.

Judgment of the Court of Appeals of Kentucky reversing said judgment, pages 229 and 230.

The opinion of the Court of Appeals on said judgment of reversal, pages 231 to 242.

Order filing petition of plaintiffs in error for a rehearing and their motion therefor, page 243.

Said petition for rehearing, pages 244 to 265.

Order overruling petition, page 266.

From Transcript No. 3.

Orders of Mason Circuit Court empaneling jury, page 13.

Order of September 11, 1906, showing verdict of jury and court's judgment thereon, page 14.

Motion and grounds by plaintiffs in error for a new trial and the court's judgment overruling same and granting them an

331 appeal to Court of Appeals, pages 15 to 18.

Orders of Court of Appeals affirming said judgment of Mason Circuit Court, pages 264 to 265.

Opinion of Court of Appeals on said judgment of reversal, pages 266 to 273.

Motion of plaintiffs in error for a rehearing and order noting its petition therefor, page 274.

Said petition for rehearing, pages 275 to 281.

Order overruling said motion and petition for rehearing, page 312.

Order filing assignment of errors by plaintiffs in error in the office of the Clerk of the Court of Appeals, page 312.

Said assignment of errors, pages 313 and 314.

Order of the Clerk of Court of Appeals showing filing of a writ of error from the Supreme Court of the United States, and order allowing same, page 315.

Said writ of error, and order allowing same signed by Ed C. O'Rear, Chief Justice of Court of Appeals of Kentucky, pages 316 and 317.

332 Order filing citation and proof of service, page 318.

Said citation and endorsement showing service, page 318.

Said citation and endorsement showing service of same accepted by counsel for defendant in error, page 319.

Order filing writ of error bond, page 320.

Said writ of error bond, pages 321 and 322.

W. H. WADSWORTH,
E. L. WORTHINGTON,
Att'ys for Pl'ffs in Error.

333 STATE OF KENTUCKY, *County of Mason:*

Executed the within statement and designation on Emma R. McCabe Administratrix of Peter McCabe, deceased, defendant in error therein, and upon Allan D. Cole, her attorney therein, by delivering to each of them a true and correct copy of the same on this the eighteenth day of May, in the year of our Lord, one thousand nine hundred and seven.

Witness my hand the day and date aforesaid.

JAMES MACKEY,
Sheriff of Mason County, Kentucky.

757, 20,722.

334 [Endorsed:] File No. 20,722. Supreme Court U. S. October Term, 1908. Term No. 89. The Chesapeake and Ohio Railway Co. *et al.*, P. E., *vs.* Emma R. McCabe, adm'x, &c. Statement of errors and designation by pl'ffs in error of parts of record necessary to be printed, & proof of service of same. Filed May 20th, 1907.

Endorsed on cover: File No. 20,722. Kentucky court of appeals. Term No. 89. The Chesapeake & Ohio Railway Company and Maysville & Big Sandy Railroad Company, plaintiffs in error, *vs.* Emma R. McCabe, administratrix of Peter McCabe, deceased. Filed May 17th, 1907. File No. 20,722.

Office Supreme Court, U. S.
FILED.
SEP 8 1908
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States

OCTOBER TERM, 1908

No. 89

Chesapeake & Ohio Railway Company and
Maysville & Big Sandy Railroad Company,
Plaintiffs in Error,

vs.

Emma R. McCabe, Administratrix
of Peter McCabe, Deceased,
Defendant in Error.

WRIT OF ERROR TO THE COURT OF APPEALS OF KENTUCKY

BRIEF FOR PLAINTIFFS IN ERROR

E. L. WORTHINGTON,
Counsel for Plaintiffs in Error.

W. H. WADSWORTH,
W. D. COCHRAN,
Of Counsel.

Supreme Court of the United States

OCTOBER TERM, 1908

No. 89

Chesapeake & Ohio Railway Company and Maysville & Big Sandy Railroad Company - - - - *Plaintiffs in Error,*

vs.

Emma R. McCabe, Administratrix of Peter McCabe, deceased - - *Defendant in Error.*

BRIEF FOR PLAINTIFFS IN ERROR

STATEMENT

May it Please the Court:

Plaintiff in error, the Chesapeake and Ohio Railway Company, is a corporation created by and organized under the laws of Virginia, and plaintiff in error, the Maysville and Big Sandy Railroad Company, is a corporation created by and organized under the laws of Kentucky.

This suit was brought in the Circuit Court of Mason County, Kentucky, on September 27, 1901, by defendant in error

or roadbed, but merely conferred upon the corporation the narrow and limited power to contract *for the operation of its road.*

Though the Maysville and Big Sandy Railroad Company undertook to contract with the Chesapeake and Ohio Railway Company *for the operation of its road;* yet, whatever may have been the intention of the parties, the domestic corporation was not authorized to cast off its duties to the public, nor was the foreign corporation authorized to make the alleged lease.

On September 21, 1901, Peter McCabe, while walking along Third Street, in the City of Maysville, Ky., was run against and killed by one of the trains operated by the Chesapeake and Ohio Railway Company. Thereafter, on September 27, 1901, defendant in error brought a suit in the Mason Circuit Court against the Maysville and Big Sandy Railroad Company and the Chesapeake and Ohio Railway Company, jointly, to recover $25,000.00 damages for the wrongful death of her intestate.

Although duly summoned to answer *on the third Monday in November,* the Chesapeake and Ohio Railway Company filed no petition for removal until the 11th day of December, 1901. The order of the Mason Circuit Court transferring the case to the United States Circuit Court for the Eastern District of Kentucky, was reversed by the Kentucky Court of Appeals on March 5, 1902.

Thereafter, on June 15, 1905, a trial was had, and the Mason Circuit Court directed a verdict for plaintiffs in error. This judgment was reversed by the Court of Appeals on December 5, 1905. Thereafter, on the 11th day of September,

1906, a second trial was had in the Mason Circuit Court, and a verdict returned in favor of defendant in error in the sum of $2,500.00. From this judgment, plaintiffs in error prosecuted an appeal to the Kentucky Court of Appeals, which judgment, affirming with damages the judgment of the lower court, is now under review in this court on writ of error.

The judgment in question should be affirmed with damages and writ of error dismissed with costs for the following reasons:

ARGUMENT

I.

THE WRIT OF ERROR SHOULD HAVE BEEN DIRECTED WITHIN THE TIME PROVIDED BY LAW TO REVIEW THE JUDGMENT OF THE KENTUCKY COURT OF APPEALS RENDERED MARCH 5, 1902, AND NOT THE JUDGMENT OF SAID COURT RENDERED MARCH 1, 1907.

Before taking up the merits of this case it seems desirable to ask the court to consider the question of jurisdiction.

There can be no doubt that the judgment of the Kentucky Court of Appeals rendered on March 5, 1902, was a final judgment. That court is bound by its decision on a prior appeal in the same cause, whether right or wrong. Hopkins *v.* Adam Roth Grocery Co., 105 Ky., 357.

There can also be no doubt that this court in the case of Bostwick *v.* Brinkerhoff, 106 U. S., 4, said:

> "The highest court of the state has decided that the suit may be maintained in the courts of the state. To

that extent, the litigation between the parties has been terminated, so far as the state courts are concerned, but it still remains to decide whether the directors have in fact been guilty of the negligence complained of, and, if so, what damages the stockholders have sustained in consequence of their neglect. The Court of Appeals has given the defendants leave to answer the complaint, and the trial court has been directed to proceed with the suit accordingly. Such being the case, it can in no sense be said that the judgment we are now called on to review terminates the litigation in the suit."

But that was a case where a citizen of New York sued the directors of a National Bank in New York to recover damages for their negligence in the performance of their official duties, and not a case where diversity of citizenship was the question for consideration.

Moreover, the demurrer to the complaint in that case was to the merits as well as to the jurisdiction.

There can be no doubt also that this court in the case of Wecker *v.* National Enameling & S. Co., 204 U. S., 182, where diversity of citizenship was the sole question for consideration, said:

"It is urged by counsel for defendants in error that the writ of error should be dismissed because there was no final judgment, and only in a case where a final judgment has been rendered can the question of jurisdiction be certified from a circuit court, under section 5 of the court of appeals act. McLish *v.* Roff, 141 U. S., 661; 35 L. ed., 893; 12 Sup. Ct. Rep., 118, is relied upon, in which it was held that a writ of error could only be taken out after final judgment.

> "It is true, after the Circuit Court of the United States maintained its jurisdiction, the plaintiff could have gone on and tried the case on its merits, and, after judgment, had there been reason for doing so, taken the case to the circuit court of appeals; but, upon refusing to recognize the jurisdiction of the circuit court, final judgment in the action was rendered, that the plaintiff take nothing by the suit and that the defendants go hence without day, and recover their costs against the plaintiff. Whether this judgment would be a bar to another action is not now before us; it is final, so far as the case is concerned, and terminated the action."

So, in the case at bar, if the state court was without jurisdiction the judgment of this court so declaring would have terminated the action.

In any event the judgment of this court reviewing the judgment of the Kentucky Court of Appeals rendered March 5, 1902, would have terminated the action either in the Mason Circuit Court or the United States Circuit Court for the Eastern District of Kentucky.

Why, then, in cases *where diversity of citizenship* is the sole question for consideration, should litigants be subjected to the delay and expense of repeated trials before it can be ascertained whether the state court has jurisdiction of the case?

Was the federal statute governing such cases intended to expedite or protract litigation?

If to expedite, then the judgment of the Kentucky Court of Appeals rendered on March 5, 1902, was a final judgment; and no writ of error having been directed to said court to review the same, this court is of necessity without jurisdiction.

II.

PETITION FOR REMOVAL FILED TOO LATE.

The record shows that on September 27, 1901, plaintiffs in error were summoned to answer the petition on the first day of November Term, 1901, of the Mason Circuit Court; and that the summons was executed on October 2, 1901.

That they were summoned to answer the amended petition on the first day of the November Term, 1901, of the Mason Circuit Court; and that summons was executed on the 4th day of November, 1901.

Referring to Kentucky Statutes, Chap. 35, Sec. 955, page 491, 1903 edition, relating to time of holding courts in the Nineteenth District, we find this language:

> "Mason County, at Maysville, on the first Monday in February, thirty juridical days, and the first Monday in June, twenty-four juridical days, and *third Monday in November*, thirty juridical days."

Referring to the Kentucky Code of Practice, Sec. 102, we find this language:

> "Defense to ordinary action must be filed on the day on which the case is set for trial."

Since there is nothing in the record to the contrary, the presumption is that the day for which plaintiffs in error were summoned to answer was the day on which the case was set for trial.

In the case of Sturges *v.* Carter, 114 U. S., 523, it is said:

> "Under the circumstances, we must presume that the judgment of the circuit court, in respect to its amount, as

well as in other respects, was right, *unless the contrary is shown*. Vantress *v.* Smith, 10 Pet., 161; Townsend *v.* Jamison, 7 How., 714; The Ship Potomac, 2 Black, 581. (67 U. S., bk. 17; L. ed., 263.)

In the case of Jones *v.* Grover & Baker Sewing Machine Co., 97 U. S., 303, it is said:

> "We can only reverse the judgment for error actually appearing. Every presumption is in favor of the correctness of the ruling below, and until we know from the record what the paper offered in evidence was, we can not say that the court improperly excluded it."

In the case of Merryman *v.* Bourne, 76 U. S., 603, it is said:

> "Error is not to be presumed. It must be affirmatively shown. Doubts are to be resolved in favor of the judgment rather than against it."

In the case of Boley *v.* Griswold, 87 U. S., 520, it is said:

> "In a court of error every presumption is in favor of the validity of the judgment brought under consideration. Error must appear affirmatively before there can be a reversal."

We have, therefore, a case where answer was due on the third Monday in November, 1901, but the petition for removal, though prepared on November 26, 1901, was neither presented nor filed until December 11, 1901. Hence the recital in the order of removal, that it was filed in time, is an erroneous and unwarranted conclusion; which the Mason Circuit Court subsequently, in effect, held it to be when it refused to allow the plea to the jurisdiction, containing said allegations, to be filed. [See page 38 of the record.]

In the case of Kansas City, Fort Scott, etc., R. R. Co. *v.* Daughtry, (an appeal from the Supreme Court of Tennessee,) 138 U. S., 298; 34 L. ed., 964, this court, although disapproving the reasons therefor, yet in affirming the judgment upon the ground that the petition for removal was filed too late, said:

> "*If, however, the denial of the application was right, as a matter of law, the judgment should not be reversed.* * * * The statute is *imperative* that the application to remove *must* be made *when the plea is due*, and because a plaintiff in error does not take advantage of his right to take judgment by default, it can not be properly held that he thereby extend the time for removal."

In the case of Martin's Admr. *v.* B. & O. R. R. Co., 151 U. S., 686, this court said:

> "The defendant's petition for the removal of the case into the Circuit Court of the United States was not filed at the rules, either in March or in April. But it was afterwards filed in and heard by the state court before the end of the April Term. It was therefore filed at or before the time at which the defendant was required by the laws of the state to answer or plead to the merits of the case, but after the time at which he was required to plead to the jurisdiction of the court, or in abatement of the writ.
>
> "Was this a compliance with the provisions of the act of Congress of 1887, which defines the time of filing a petition for removal in the state court? We are of the opinion that it was not, for more than one reason. This provision allows the petition for removal to be filed at or before the time when the defendant is required by the

local law or rule of court 'to answer or plead to the declaration or complaint.' These words make no distinction between different kinds of answers or pleas; and all pleas or answers of the defendant, whether in matter of law by demurrer, or in matter of fact, either by dilatory plea to the jurisdiction of the court or in suspension or abatement of the particular suit, or by plea in bar of the whole right of action, are said, in the standard books on pleading, to 'oppose or answer' the declaration or complaint which the defendant is summoned to meet. Stephen Pl. (1st Am. ed.) 60, 62, 63, 70, 71, 329; Lawes Pl., 36. The Judiciary Act of September 24, 1789, Chap. 20, Sec. 12, required a petition for removal of a case from a state court into the Circuit Court of the United States to be filed by the defendant 'at the time of entering his appearance in such state court.' 1 Stat. at L., 79. The recent acts of Congress have tended more and more to contract the jurisdiction of the courts of the United States, which had been enlarged by intermediate acts, and to restrict it more nearly within the limits of the earliest statute. Pullman Palace Car Co. *v.* Speck, 113 U. S., 84 (28: 925); Smith *v.* Lyon, 133 U. S., 315, 320 (33: 635, 637); Ex-parte Pennsylvania Co., 137 U. S., 451, 454 (34: 738, 740); Fisk *v.* Henarie, 142 U. S., 459, 467 (35: 1080, 1082); Ex-parte Shaw ('Shaw *v.* Quincy Min. Co.')

"Construing the provision now in question, having regard to the natural meaning of its language, and to the history of the legislation upon this subject, the only reasonable inference is that Congress contemplated *that the petition for removal should be filed in the state court as soon as the defendant was required to make any defense whatever in that court*, so that, if the case should be removed, the validity of any and all of his defenses should

be tried and determined in the Circuit Court of the United States.

"As the petition for the removal of this case into the Circuit Court of the United States was not filed in the state court within the time mentioned in the act of Congress, it would follow that, if a motion to remand upon that ground had been made promptly and denied, the judgment of the Circuit Court of the United States must have been reversed, with directions to remand the case to the state court. Edrington *v.* Jefferson, 111 U. S., 770 (28: 594); Baltimore & Ohio R. R. Co. *v.* Burns, 124 U. S., 165 (31: 33.)"

Following these authorities in the case of Fidelity Trust & Safety Vault Co. *v.* Newport News & M. V. R. R. Co., 70 Fed. Rep., 405, Judge Barr held that "where the Kentucky Code of Practice requires defendant to file his answer within twenty days from the date of service, and there is no service, but defendant especially appears for the purpose of objecting to the jurisdiction, he, *at most*, has only twenty days from such appearance in which to remove the cause."

Hence, if this court has jurisdiction, it follows from the foregoing authorities that a removal of the cause was not effected, by reason of the non-compliance of plaintiffs in error with the federal statute; and, the United States Circuit Court for the Eastern District of Kentucky having disregarded her objection to its jurisdiction and overruled the motion of defendant in error to remand, the judgment in question should, therefore, be affirmed.

III.

THE PETITION FOR REMOVAL DID NOT STATE FACTS SUFFICIENT TO DIVEST THE MASON CIRCUIT COURT OF JURISDICTION.

(*a*)

The petition did not state facts to show that the petitioner, the Chesapeake and Ohio Railway Company, a corporation of Virginia, had power or authority to make the contract, or to receive the property of the Maysville and Big Sandy Railroad Company under the alleged lease. The petitioner simply stated its conclusion, that it had such authority. Encyc. of Pleading and Practice, Vol. 12, page 1035; Jones *v.* Tennessee Bank, 8 B. M. (Ky.), 124. Whereas it was necessary that the law of Virginia should be plead conferring such authority, if any existed.

In the case of Roots *v.* Merriwether, 8 Bush., 401, it is said:

> "The law of another state when depended upon in a court of Kentucky, is nothing but a fact, must be pleaded, as any other fact, with sufficient distinctness, that the court upon a statement of facts may judge of what is the effect of the law.
>
> "In this instance the court is required, if the plea is held good, to take the plaintiff's conclusion or opinion as a fact, and no fact is alleged upon which the court can have an opinion of its own as to the effect of the law."

To the same effect is Encyc. of Pleading and Practice, Vol. 12, 1041.

Inasmuch as such contract is not among the ordinary powers of a railroad company, it can not be presumed, in the absence of any averment of facts, that the Chesapeake and Ohio Railway Company had authority to make a contract to receive and operate the road and franchises of the Maysville and Big Sandy Railroad Company.

In the case of Pennsylvania R. R. Co. *v.* St. Louis, etc., R. R. Co., 118 U. S., 290, it is said:

> "We think it may be stated, as the just result of these cases and on sound principle, that, unless specially authorized by its charter or aided by some other legislative action, a railroad company can not by lease or any other contract, turn over to another company, for a long period of time, its road and all its appurtenances, the use of its franchises, and the exercise of its powers; *nor can any other railroad company without similar authority make a contract to receive and operate such road, franchises and property of the first corporation;* and that such a contract is not among the ordinary powers of a railroad company; and is not to be presumed from the usual grant of powers in a railroad charter."

In the case of McCormick *v.* Market National Bank, 165 U. S., 550, it is said:

> "It is settled by a long series of decisions of this court, that a lease of a railroad by one railroad corporation to another, which is beyond the corporate powers of either, is unlawful and void, and cannot be made good by ratification or estoppel, so as to sustain an action upon the lease; that this is so, not only when the lease is *ultra vires* of the lessor corporation, and therefore open to the objection of disabling it from performing those duties to the public, its performance of which was the consideration upon

which it received its charter from the state, *but even if the lease is ultra vires of the lessee corporation only*, and therefore not open to that particular objection. Thomas *v.* West Jersey R. R. Co.; Pennsylvania R. R. Co. *v.* St. Louis, A. & T. H. R. R. Co.; Oregon R. R. & Nav. Co. *v.* Oregonian R. R. Co., and Central Transp. Co. *v.* Pullman Palace Car Co., above cited; St. Louis, V. & T. H. R. R. Co. *v.* Terre Haute & I. R. R. Co., 145 U. S., 393, 404, (36: 748, 753.)"

Since the Chesapeake and Ohio Railway Company had no authority to make a contract to receive and operate the road, franchises and property of the Maysville and Big Sandy Railroad Company it continued liable for all of the negligence of its lessor affecting the public; the former being regarded simply as agent of the latter in operating the road. Arrowsmith *v.* Nashville & D. R. R. Co., 57 Fed. Rep., 171; L. & N. R. R. Co. *v.* Breedin's Admr., 111 Ky., 729; Hukill *v.* Maysville & Big Sandy R. R. Co., 72 Fed. Rep., 752.

(*b*)

The petition did not state the title to the act of the Legislature of Kentucky incorporating the Maysville and Big Sandy Railroad Company, nor the day on which it became a law,—though in point of fact it was passed on November 25, 1851, as shown in paragraph 70 of the record. Section 119 of our Civil Code of Practice provides:

"In pleading a private statute, it shall be sufficient to refer to it by stating its title and the day on which it became a law."

The petitioner only alleged its conclusion as to the contents which were that the Maysville and Big Sandy Railroad Company had the power to transfer to the petitioner by *lease* the railroad. Nichols *v.* Bardwell Lodge, 105 Ky., 168; Rudd *v.* Deposit Bank, 105 Ky., 443; Gaertner *v.* Lou. Stone Co., 114 Ky., 160.

(*c*)

The petition did not state the contents of the alleged contract of lease, nor was a *copy* thereof *filed*. The *conclusion* was that the lease gave the Chesapeake and Ohio Railway Company dominion over the road, and that under the same it operated the road. It admitted that the Maysville and Big Sandy Railroad Company is and was the *owner* of the road; that it still maintains its corporate organization and existence, but, instead of operating the road directly, has bargained with the Chesapeake and Ohio Railway Company to run it presumably for compensation, as the terms of the lease are not stated in the petition for removal. Encyc. of Pleading and Practice, Vol. 12, 1038; Collins *v.* Blackburn, 14 B. M., 252; Riggs *v.* Maltby, 2 Met., 88; Huffaker *v.* Nat. Bank, 12 Bush, 287.

In the case of Illinois Cent. R. R. Co. *v.* Sheegog's Admr., 103 S. W. Rep., 326, the Kentucky Court of Appeals has decided that under our Code of Practice, a similar petition for removal was defective. So also has this court in the case of Gold-Washing & Water Co. *v.* Keyes, 96 U. S., 199, said:

> "For the purpose of the transfer of a cause, the petition for removal, which the statute requires, performs the office of pleading. * * * It should, therefore, set forth the *essential* facts *not otherwise appearing in the*

case, which the statute had made conditions precedent to the change of jurisdiction. If it fails in this, *it is defective in substance*, and must be treated accordingly. * * * The office of pleading is to state facts, *not conclusions of law*. It is the duty of the *court* to declare the conclusions, and of the *parties* to state the *premises*."

Indeed, the *petition of defendant in error* presents another illustration of conclusions of the pleader wherein it is alleged that the Chesapeake and Ohio Railway Company "still is in the *exclusive* possession and control thereof and controlling and operating trains of cars thereon, and was *so* in possession at the time of the injuries herein complained of."

But the Kentucky Court of Appeals held, notwithstanding these conclusions of the pleader, that the Chesapeake and Ohio Railway Company was merely an operating agent and could not as a matter of law take exclusive possession and control of its lessor's property.

In the case of Alabama *v.* Burr, 115 U. S., 413, it is said:

"The declaration does indeed allege that 'by reason of the aforesaid wrongful, illegal and fraudulent acts of the said * * * company, permitted and participated in by the defendants,' the corporation became bankrupt and was rendered wholly unable to pay its debts, and especially the interest on its bonds; and that the state has been compelled to make certain payments on that account, 'which she would not have been compelled to pay but for the wrongful, illegal and fraudulent acts of the defendants and said corporation;' and that, 'by reason of the aforesaid wrongful, illegal and fraudulent acts of the said * * * company and of the defendants, the said plaintiff has been further damnified and injured to the additional extent of one million of dollars in settling her liability

created and evidenced by her aforesaid endorsement of said endorsed bond;' *but this is not enough*, unless the facts in which this conclusion is drawn are such as to show that the loss was both the natural and immediate consequence of the wrongful and fraudulent acts referred to.

"*Pleadings must state facts, and not conclusions of law merely, and the allegation in this case that the loss arose from the fraud is only a conclusion of law. If the facts from which the conclusion is drawn are not sufficient to show that in law the loss was attributable to the fraud, the declaration is bad.*"

But plaintiffs in error did plead the amendment to the charter of the Maysville and Big Sandy Railroad Company, enacted on February 17, 1866, and stated their *conclusion* that the Maysville and Big Sandy Railroad Company had full power and authority thereunder to make a lease or contract "for the operation of its railroad by this defendant, and that the contract, under which it was and is operating said railroad at the time of the injury complained of, *was in pursuance of said authority.*"

However, in alleging the authority of the Maysville and Big Sandy Railroad Company to make the lease to be pursuant to the amendment to its charter, the Chesapeake and Ohio Railway Company in effect admitted the liability of the Maysville and Big Sandy Railroad Company for the torts of its operating agent; inasmuch as the *Court of Appeals*, in construing this special act of the legislature in this case, *concluded* that such liability exists. The question of such liability being one of the issues of law arising upon the facts of this case, which must be determined by the court in which the suit is heard upon its merits; (Evans *v.* Felton, 96 Fed. Rep., 177;

L. & N. R. R. Co. *v.* Wangelin, 132 U. S., 599,) and having been determined adversely to appellant's contention, it can not, except as a conclusion of the pleader, be said to be a sham or fraudulent issue wrongfully injected into the case for the sole purpose of defeating the right of removal.

In the case of Clinger's Admx. *v.* C. & O. Ry. Co. of Ky., etc., 109 S. W. Rep., 315, it is said:

> "The order of removal was made upon the petition of appellee, the Chesapeake and Ohio Railway Company of Virginia, a foreign corporation. It was alleged in the petition, in substance, that it and the plaintiff were citizens of different states, that its co-defendants, the Chesapeake and Ohio Railway Company of Kentucky and Shannon Hall, were not necessary nor proper parties to the action, and that they were made defendants for the sole purpose of preventing a removal of the cause to the federal court, thereby unlawfully and fraudulently depriving the petitioner of a right conferred upon it by the Constitution and laws of the United States; and averred that the allegations of negligence contained in plaintiff's petition as to its co-defendants were untrue, and known to be so by her when this suit was brought. It was further alleged that the petition of plaintiff stated no cause of action at all against its co-defendants, or either of them. *The charge that its co-defendants were not necessary nor proper parties to the action, and that her sole purpose in making them defendants was a fraudulent one to deprive it of its constitutional right, amounts only to a conclusion of the pleader.* She could, possibly with the same propriety, have stated that they were necessary parties, and that the petition of appellee for removal was for the fraudulent purpose of depriving her of the right to a trial of the

case at her residence; and *this is also true of the allegation in the petition for removal that the negligence charged in her petition against its co-defendants was untrue, and so known by the plaintiff at the same time she filed her petition. This allegation and the others referred to did not state any jurisdictional fact.* The question of negligence or no negligence was an issue solely within the province of the jury to hear and determine. See Chesapeake & Ohio Ry. Co. *v.* Dixon, 179 U. S., 131; 21 Sup. Ct., 67; 45 L. ed., 121; Cincinnati, New Orleans & Texas Pacific Ry. Co. *v.* George Bohon, 200 U. S., 221; 26 Sup. Ct., 166; 50 L. ed., 448; Rutherford *v.* Illinois Central R. R. Co., etc., 120 Ky., 15; 85 S. W. Rep., 199, and Illinois Central R. R. Co. *v.* Sheegog's Admr., 103 S. W. Rep., 323; 31 Ky. L. Rep., 691."

In the Dixon case, supra, Chief Justice Fuller said:

"If the liability of defendants, as set forth in that pleading, was joint and the cause of action entire, then the controversy was not separable as matter of law, and *plaintiff's purpose in joining Chalkey and Sidles was immaterial.* The petition for removal did not charge fraud in that regard or *set up any facts and circumstances indicative thereof,* and plaintiff's motive in the performance of a *lawful act* was not open to inquiry."

Since, under the law of Kentucky, the domestic corporation is absolutely responsible herein for the torts of its operating agent, the foreign corporation, and since the latter had no authority to make the alleged lease, the allegations of fraud in the petition for removal were not only conclusions of the pleader; but, in the nature of the case, it was also impossible for the petitioner to allege any facts or circumstances indicative of fraud in the lawful joinder of the two corporations. In this

respect, the case at bar differs materially from the case of Dishon *v.* Cincinnati, N. O. & T. P. Ry. Co., and the case of Wecker *v.* National Enameling & S. Co., 204 U. S., 178; for, whereas in the case at bar the absolute right to join the two corporations exists; the right to join a corporation and any of its resident employes, under the law of Kentucky, is not absolute, but conditioned upon the statement in good faith of facts sufficient to impose upon the resident employe liability jointly with the corporation. In cases like the one at bar, there is no chance of a fraudulent joinder; but in cases where the corporation is joined with any of its resident employes there may be. For example, in the Dishon case, supra, it is said:

> "We think the court was right in refusing to remand the case to the state court. At the time the petition for removal was filed, nearly three months had elapsed since summons issued for Coffman had been returned, 'Not found.' No efforts were being made to bring Coffman into court and prosecute the action against him. The petition for removal, which was verified, denied that Coffman was a citizen of Kentucky, averred that he had not been served with summons, and alleged that it was not the purpose of the plaintiff to prosecute the action against him, but that he had been made a party defendant for the sole purpose of preventing the removal of the case to the United States court. *It further averred that Coffman 'did not in any manner or degree contribute to the death or injury of said plaintiff's decedent through his own negligence or through any joint negligence with this petitioner;'* that the plaintiff knew this when he filed his petition; and that Coffman was a sham defendant—made so for the sole purpose of fraudulently defeating the jurisdiction of the United States court."

But where, as in the case at bar, no facts or circumstances indicative of fraud can be alleged, the motive in the performance of a lawful act, is not open to inquiry; and, therefore, the Dishon and Wecker cases, supra, can not be invoked to support a contention that there should be in such a case a traverse of the petition for removal.

> "A pleader is under no obligation to deny the legal conclusions set out in the pleadings of his adversary; indeed, it would be improper for him to do so. It can not be presumed, therefore, that the truth of such allegations is admitted because not denied." Encyc. of Pleading and Practice, Vol. 12, page 1025.

IV.

THE PETITION OF DEFENDANT IN ERROR STATES A JOINT AND NOT A SEPARATE CAUSE OF ACTION AGAINST PLAINTIFFS IN ERROR.

(*a*)

BECAUSE THE LIABILITY OF THE MAYSVILLE AND BIG SANDY RAILROAD COMPANY EXISTS BY VIRTUE OF SECTION 206 OF THE KENTUCKY CONSTITUTION.

In the original opinion in this case, the Kentucky Court of Appeals, having construed the statute, proceeded also to construe section 206 of the constitution; but on petition for rehearing so much of the opinion as construed this section was stricken out as being unnecessary to the decision. However, in the case of Illinois Central R. R. Co. *v.* Sheegog's Admr., 103 S. W. Rep., 327, a construction of this section became

necessary, and the court, in adopting the construction given to section 206 in the original opinion in this case, says:

> "Even if the *act* and the *lease* had not been defectively pleaded, the result would be the same. The Chicago, St. Louis and New Orleans Railroad Company was given a franchise by the state, and it therefore assumed certain burdens, and under the constitution and laws of this state, it can not by a lease exempt itself from responsibility for the torts of itself and lessee. In the case of Lee *v.* Southern Pacific R. R. Co., 47 Pac., 932; 116 Cal., 97; 38 L. R. A., 71; 58 Am. St. Rep., 140, the court said: 'Where a statute authorizing leases contains no clause exempting in any respect the lessor from liability, it is well settled that the lessor still remains liable for an injury resulting from the negligent omission of a duty owed by it to the public, such as the proper construction of its road, station houses,' etc. Section 203 of the state constitution is in these words:
>
> " '*No corporation shall lease or alienate any franchise so as to relieve the franchise or property held thereunder from the liability of the lessor or grantor, lessee or grantee, contracted or incurred in the operation, use or enjoyment of such franchise or any of its privileges.*' The court in construing this section of the constitution, in the case of McCabe's Admx. *v.* Maysville and Big Sandy Railroad Company, supra, said: 'The franchises of a corporation are its property. The declaration that these, in case of a lease or alienation, shall not be relieved from the liability of the lessor or grantor, lessee or grantee, contracted or incurred in the use of the franchise, or any of its privileges, is, in substance, a declaration that the corporation shall not be relieved of such liability, for its existence is inseparable from all of its franchises. Under this section, therefore, no lease made by a corporation can

exempt it from liability for the wrongs of the lessee. If the lease in question was made after the adoption of the constitution, it would not exempt the lessor from liability; * * * but, if it was made before the adoption of the constitution, the result is the same.' "

(*b*)

BECAUSE THE MAYSVILLE AND BIG SANDY RAILROAD COMPANY, A KENTUCKY CORPORATION, IS LIABLE TO THE PUBLIC FOR THE TORTS OF ITS OPERATING AGENT, THE PLAINTIFF IN ERROR, CHESAPEAKE AND OHIO RAILWAY COMPANY, A VIRGINIA CORPORATION; AND, THEREFORE, A JOINT CAUSE OF ACTION ARISES UNDER SECTION 241, KENTUCKY CONSTITUTION, AND SECTION 6, KENTUCKY STATUTES.

The case relied upon to sustain the contention of plaintiffs in error that the Maysville and Big Sandy Railroad Company is not liable to the public for the torts of its operating agent, the Chesapeake and Ohio Railway Company, is the case of Arrowsmith *v.* Nashville and D. R. R. Co., 57 Fed. Rep., 165. That is a case where, construing the statutes of Alabama and Tennessee for the first time, the court said:

"There *was express statutory authority* to support the leasing of the Nashville and Decatur Railway to the Louisville and Nashville by the legislatures of *both the states* of Tennessee and Alabama. Sections 1122 and 1123 of the Code of Tennessee of 1858, being sections 1249D and 1249E of compilation of Millikian & Vertree's, are as follows:

" '1122. A railroad company owning any main line may contract with any company owning a railroad connection with such main line for the lease thereof.

"'1123. The lessee shall hold such road subject to the liens and *liabilities* to which it was subject in the hands of the lessor and *be bound for all payments for which the lessor was liable.*'

"The effect of these sections is to *permit connecting lines to be leased and to impose upon the lessee company all liabilities in favor of the state, or the general public, imposed by the charter of the lessor company or the general law of the state.* The Alabama statute is equally explicit as to the power to make a lease, and it is equally silent as to the future exemptions and liabilities of the lessor company. (See Alabama Acts of 1868, pages 470, 471.) The question for decision is *res integra* in Tennessee. The same may be said as to Alabama, the state within which plaintiff's intestate sustained the injury from which he died."

We find, then, two things worthy of observation, which do not exist in the case at bar: First, that the court was construing the statutes of Alabama and Tennessee, which not only authorized a railroad company, owning a main line, to lease a connecting line, *but which also imposed upon* the *lessee the liabilities in favor of the state or the general public imposed by the charter of the lessor company or the general law of the state;* and, second, that these statutes *never having been construed by the supreme court of said states*, the question as to the intention of the legislature in enacting them was *res integra.* Moreover, the *distinction* between the *Arrowsmith case* and the case at bar is made by the court in that case, on page 174, where it is said:

"Plaintiff also cites and relies upon Questead *v.* Railway Co., 127 Mass., 204. That case was this: The horse railway company leased its line of railway *under a statute*,

which authorized it to lease its road and franchise to any responsible party *for the operation of the road*, but provided that such lease or contract shall *not release* or *exempt* such company from any duties, liabilities or restrictions to which it would otherwise be subject. The court held, *that the effect of this provision was that the defendant had the same liability to compensate persons injured during the management of the road, while the lease was in force, as it would have had if the corporation had been managing its own road. The case turned wholly upon the construction of the statute authorizing the lease.*"

We have, then, an implied, if not an expressed, recognition by the court in the Arrowsmith case of the correctness of the ruling in the Questead case, fixing upon the lessor liability to the public for the torts of its lessee, and inasmuch as the facts in the Questead case are practically the same as those in the case at bar, the Arrowsmith case, in reality, supports the contention of defendant in error as to the liability of the domestic corporation, even if the foreign corporation had possessed authority to make the contract.

(*c*)

BECAUSE THE CONSTRUCTION OF THE ACT OF THE LEGISLATURE OF KENTUCKY IS THE GROUND OF THE DECISION OF THE KENTUCKY COURT OF APPEALS IN THE M'CABE CASE.

From even a cursory reading of the case of McCabe's Admx. *v.* M. & B. S. R. R. Co., 112 Ky., 861, it will be seen that the court rests the liability of the Maysville and Big Sandy Railroad Company to the public for the torts of its operating agent, the Chesapeake and Ohio Railway Company, upon the ground that the lessor has no contractual power to

exempt itself from liability to the public for the torts of its lessee; that the lessor still retains paramount authority as master and the lessee is simply its operating agent or servant; and this lack of contractural power to do otherwise is the construction the court gives to or places upon the statute of Kentucky, passed February 17, 1866. (See Acts of 1866, Vol. 1, page 664.) In considering this act and its various amendments, the court used this language:

> "*The common law distinctions between different forms of action have been abolished by our Code of Practice, and all persons who are liable for a wrong may now be sued jointly in this state in an action to recover for negligence.* A railroad company is given by the state certain franchises, and, therefore, assumes certain burdens. These it can not transfer to another *without legislative authority*, so as to exempt it from responsibility for the torts of its transferee. *In the absence of legislative authority, the Maysville and Big Sandy Railroad Company was, therefore, liable to appellant, jointly with the Chesapeake and Ohio Railway Company, if the transfer was unauthorized; and, in this event, the suit against the two companies jointly might be properly maintained.* We are also referred to the following provision: 'Act of February 17, 1866, section 3. (See Acts of 1866, Vol. 1, page 664.) The purchaser or purchasers at such sale, after the same had been ratified and approved by said court, shall, in virtue thereof, be invested with the title to said road and all its franchises and charter privileges as fully and completely as if the same had originally been granted to them. They shall have power to organize a company, under its charter, and for the purpose of its charter, open books and receive and collect subscriptions of stock to said company, *make contracts with individuals, corporations and*

other railroad companies for the building, completion and operation of said road or any part thereof.' When this statute was passed, the road was not completed; *the purpose of the provision was to enable the company to complete and operate the road. To this end* it was empowered to 'make contracts with individuals, corporations, and other railroad companies for the building, completion and *operation* of said road or any part thereof.' Thus, power was granted it to make the contracts with the Chesapeake and Ohio Railway Company *above referred to; but no exemption was granted from any liability* which attached to it, *and such exemption as against the public can not be implied.* While there is some conflict of authority with them, the great weight supports this conclusion.''

(*d*)

BECAUSE THE RULE IN THE M'CABE CASE IS THE SETTLED LAW IN KENTUCKY.

We have not been able to find any case where the Court of Appeals of Kentucky had under consideration the provisions of the statute similar to the special act of the legislature creating the Maysville and Big Sandy Railroad Company, which is in conflict with the decision in the McCabe case.

The case of Harper *v.* Newport News R. R. Co., 90 Ky., 360, is expressly referred to in the McCabe case, wherein the court said:

> ''In Harper *v.* Railroad Co., 90 Ky., 59, the question is not elaborated, and it is apparent from the opinion that only the question of jurisdiction was considered by the court, for it does not appear from the facts stated that the lease in that case was authorized by the statute, or under what provision of law it was made.''

The case of Sinkhorn *v.* Lexington Turnpike Road Co., 112 Ky., 211, is not in conflict with the McCabe case, because the *general law* under which the turnpike was leased authorized it in effect to contract so as to exempt itself from liability. In other words, the legislature thereby conferred upon the turnpike company larger and more liberal contractural powers than the special act of the legislature conferred upon the Maysville and Big Sandy Railroad Company. That this distinction was made by the court, is easily inferred from the following language in the Sinkhorn case:

> "According to the law in the Harper case, if the lease is made of the entire road, its rights and franchises, *and it is by virtue of general law authorizing such lease, then* the lessor is not liable for the misdoings or torts of the lessee while in *such* possession."

Hence, although the Maysville and Big Sandy Railroad Company had authority to make *a* lease by virtue of its power "to make contracts with individuals, corporations and other railroad companies for the building, completion and *operation* of its road, or any part thereof;" yet it had absolutely *no* authority to make *the* lease insofar as it undertook to contract away its liability to the public. Although such power had been given to the Lexington Turnpike Road Company, under the general turnpike law, yet no such power had been given under the special law and various amendments thereto creating the Maysville and Big Sandy Railroad Company. And in both cases the Court of Appeals was clearly construing acts of the Legislature of Kentucky and nothing else.

Moreover, that this distinction is well founded and was recognized by the Kentucky Court of Appeals, appears in the

case of Howard *v.* M. & B. S. R. R. Co., 70 S. W. Rep., 631, where Judge White, *who wrote the opinion in the Sinkhorn case*, used this language:

> "We are of opinion that the petition states a cause of action against the Maysville and Big Sandy Railroad Company, as well as against the Chesapeake and Ohio Railway Company. By an agreement, pleaded as having been entered into between Maysville and Big Sandy Railroad Company and Reinert, the landowner, it becomes its duty to erect a fence along its right of way; and it was suffered and permitted to remain out of repair, and the appellant herein was injured thereby, he can recover against the company *owning the road*, as well as the one *operating under the lease*. The duty to maintain the fence and keep in repair can not be shifted from the Maysville and Big Sandy Railroad Company by the lease, so as to relieve itself from liability. (McCabe's Admx. *v.* R. R. Co. (Ky.,) 66 S. W. Rep., 1054.) The court, therefore, erred in sustaining the demurrer to the petition."

Then, again, in the case of Davis's Admr. *v.* C. & O. Ry. Co., 75 S. W. Rep., 277, the Kentucky Court of Appeals again recognized the rule in the McCabe case, and used the following language:

> "After a petition for removal had been filed, appellant tendered an amended petition making the Maysville and Big Sandy Railroad Company, the domestic corporation and appellee's lessor, a defendant. It came too late to prevent a removal of the case, Therefore it was not within the rule of McCabe, (Ky.) 66 S. W., 1054; *Pierson v. Ill. Cent. R. R. Co.*, (*C. C.*,) *118 Fed.*, *342*."

In the case of Swice's Admr. *v.* M. & B. S. R. R. Co., 75 S. W. Rep., 278, the Court of Appeals once more reaffirmed

the doctrine in the McCabe case, at the same time differentiating the two cases.

In the case of Brooker *v.* M. & B. S. R. R. Co., 119 Ky., 137, the Court of Appeals again reaffirmed the rule in the McCabe case, using the following language:

> "It is not averred that the lease was made with leave of the county court, and from the allegation that all three of the defendants are operating the ferry, the presumption would be that the Chesapeake and Ohio Railway Company is operating under the authority granted the Maysville and Big Sandy Railroad Company. In McCabe's Admx. *v.* M. & B. S. R. R. Co., 112 Ky., 861, it was held that the only authority in the Maysville and Big Sandy Railroad Company to lease its road was that derived from the Act of February 17, 1866, (Acts, 1865–66, p. 664, c. 755,) authorizing it 'to make contracts with individuals, corporations and other railroad companies for the building, completion and *operation* of its said road or any part thereof,' but it was held that thereby no exemption was granted from any liability which attached to the company. The court said: '*In the case before us there is only a grant to the lessor of power to contract for the operating of the road.* The company enjoys all its franchises in the fruits of the contract. There is nothing in the provision to show that the legislature had in mind authorizing the company to divest itself of its franchises or permitting it, while enjoying them or their fruits, to be acquit of their responsibility for their abuse, without regard to the financial ability of the lessee or his amenability to suit.' *To this construction of the statute we adhere.*"

In the case of Illinois Central R. R. Co. *v.* Sheegog's Admr., 103 S. W. Rep., 327–328, the court again approved the rule in the McCabe case, as follows:

"It will be seen from the petition of removal that there is no allegation that the act authorizing the lease even attempted to relieve the lessor from its primary responsibility to the public; and the court in the McCabe case continuing, said: 'After conferring upon a corporation the right of eminent domain, with many other special privileges which the legislature is empowered to grant only in consideration of its duty and obligation to serve the people by affording them the means of safe as well as speedy transportation for themselves and their property, the state can not be held to have abdicated its right to protect the patrons of the road who are under its care by the strained construction of a naked power to lease. Such a power does not carry with it the authority to the lessor to absolve itself and transfer its duties and obligations to another, whether able or unable to respond in damages for its wrongs and defaults.' See to the same effect: Balsley *v.* Railroad Co., 119 Ill., 68; 8 N. E., 859; 59 Am. Rep., 784; Singleton *v.* Southwestern R. R., 70 Ga., 464; 48 Am. Rep., 574; Tillett *v.* Railroad Co., 118 N. C., 1031; 24 S. E., 111; Railroad Co. *v.* Morris, 68 Tex., 59; 3 S. W., 457; Chollette *v.* Railroad Co., 26 Neb., 169; 41 N. W., 1106; 4 L. R. A., 135; Parr *v.* Railroad Co., 43 S. C., 197; 20 S. E., 1009; 49 Am. St. Rep., 826; Pennsylvania Co. *v.* Ellett, 132 Ill., 654; 24 N. E., 559; Stephens *v.* Railroad Co., 36 Iowa, 327; Bower *v.* Railroad Co., 42 Iowa, 546; Railroad Co. *v.* Lee, 71 Tex., 538; 9 S. W., 604. * * * If it be true, as the decisions with substantial unanimity admit, that the lessor railway remains liable for the discharge of its duties to the public, unless expressly exempted therefrom by statute, it seems difficult to conceive its absence of liability in any event, except, perhaps, where the plaintiff is suing upon an express contract made with him by the lessee corporation. Is it not as much a public duty on the part of

the railway corporation to operate its trains without negligence as it is to receive all freight offered for transportation, or to carry all passengers who offer to pay the regular rates, or to keep its tracks and station houses in safe condition? In truth, we do not know of any duties of a railway corporation which are of a private character. * * * By its acceptance of the franchise conferred by the state, the corporation assumed the corresponding burdens thereby imposed. These franchises it could not transfer to another without distinct legislative authority. The grant of power to lease its property is one thing; the grant of absolution from its responsibility is another, and is not to be inferred from a mere power to lease the road where the corporation still retains its existence and the enjoyment of its franchises in the rents, for such grants are strictly construed, and, as against the public, are never extended by any construction. *In the case before us, there is only a grant to the lessor of power to contract for the operating of the road.* The company enjoys all its franchises in the fruits of the contract. There is nothing in the provision to show that the legislature had in mind authorizing the company to divest itself of its franchises, or permitting it, while enjoying them or their fruits to be acquitted of responsibility for their abuse, without regard to the financial ability of the lessee or his amenability to suit.

"But it is said that this responsibility of the lessor does not apply to the employes of the lessee of the road, that the lessor owed no duty to them, and that they are not members of the public in the sense used in the decisions on that subject. It is true that the courts in part have made this distinction, but have only extended the rule and exempted the lessor from torts of the lessee resulting from the negligent operation and handling of its trains and the general management of the leased property, but hold the

lessor bound for an injury resulting from the negligent omission of some duty owed to the public, such as the proper construction of its road, station houses, etc. *In the case of Swice's Admx.* v. *Maysville & Big Sandy R. R. Co., 116 Ky., 253; 75 S. W., 278, this distinction was recognized to be the true rule.*"

In the case of Clinger's Admx. *v.* C. & O. Ry. Co., 109 S. W. Rep., 317, the Court of Appeals on April 15th, 1908, again reaffirmed the rule in the McCabe case, as follows:

"The only question remaining to be determined is whether the Chesapeake and Ohio Railway Company in Kentucky is responsible in damages with the Chesapeake and Ohio Railway Company in Virginia for the death of plaintiff's intestate. *Appellee's counsel virtually concede that, if the provisions of the charter of the Maysville and Big Sandy Railroad Company, which charter the Chesapeake and Ohio Railway Company in Kentucky took when it was incorporated, with reference to its powers to lease the road, are in full force and effect, under the authority of the case of McCabe's Admx.* v. *M. & B. S. R. R. Co., 112 Ky., 861; 66 S. W., 1054, the Chesapeake and Ohio Railway Company in Kentucky would be responsible jointly with the lessee, the Virginia corporation;* but contend that this provision of the charter of the Maysville and Big Sandy Railroad Company stands repealed by section 573 of the Kentucky Statutes of 1903, which in effect says that all provisions of charters and articles of incorporation which are inconsistent with the provisions of chapter 32 of the Kentucky Statutes stand repealed to the extent of such conflict, and claims that the lease made by the Chesapeake and Ohio Railway Company in Kentucky to the Virginia corporation was made under the provisions of section 769, Ky. St., 1903. The first part of this section deals with the construction of spurs, tracks or branches of

roads by railroad companies organized in Kentucky, and also authorizes such corporations to purchase the property and franchise of any other railroad company not a competing or parallel line, then authorizes such corporations to sell its franchise and property to any other company not a competing or parallel line, or not otherwise prohibited by law to purchase; and after speaking of other matters not germane to the matter under consideration, the section closes with these words: 'And may make any agreement or arrangement, not inconsistent with law, with any other railroad company.' *There is no claim that the Chesapeake and Ohio Railway Company in Kentucky sold its property and franchises to the Chesapeake and Ohio Railway Company in Virginia; but appellees claim that the lease was made under the clause of section 769, above quoted*, and that it exempts the Chesapeake and Ohio Railway Company in Kentucky from all responsibility, while the Chesapeake and Ohio Railway Company in Virginia controls and operates the road. We deem it unnecessary to consider and determine whether the provision of the charter referred to in the McCabe case, supra, was repealed or not by the enactment of section 573, Ky. St., 1903, for the reason that, in our opinion, if the lease was made under the authority of section 769 Ky. St., 1903, it did not have the effect to relieve the Chesapeake and Ohio Railway Company in Kentucky from the same responsibility as existed under the charter of the Maysville and Big Sandy Railroad Company before the enactment of section 573."

Then, again, on page 318, the court in the same case said:

"Appellees' counsel contends that the cases of Harper *v.* N. N. & M. V. Ry. Co., 90 Ky., 360; 14 S. W., 346, and Sinkhorn *v.* Lexington, H. & P. Turnpike Co., etc., 112 Ky., 205; 65 S. W., 356, establish a different rule, and have the effect to release the lessor from liability for

the negligence of appellees' servants in the operation of trains. The Harper case was decided September, 1890, and it appears that the employes of the Newport News & M. V. Ry. Co. (a lessee) caused the injuries to Harper; but it does not appear whether Harper was an employe of that company or a third party. The presumption is that he was an employe. If otherwise, the opinion would be against the trend of all the authorities. The Sinkhorn case was one wherein Sinkhorn received his injuries by reason of a defective bridge on a turnpike road, after the county had become the owner of it under legislative authority, after a vote by the people of the county. When Sinkhorn was injured the turnpike company did not own the road or the franchise. The county owned both. The county was relieved from responsibility on the general principle that a county could not be made liable for such torts. Of course, the turnpike company was not liable, because it had no interest in the road at the time Sinkorn was injured; and the court, in substance, said that when the turnpike company had surrendered all *ownership and control* to the county, it was not responsible for the torts of the county."

In view of these decisions there would seem to be no room for doubt, not only that the rule in the McCabe case is the settled rule of law in Kentucky; but also that in said case, the Court of Appeals was interpreting an act of the legislature, and that its interpretation thereof to the effect that the lessor still retained paramount authority as master and the lessee is simply its operating agent or servant was the ground of its decision.

(*e*)

BECAUSE THE FEDERAL COURT SHOULD FOLLOW THE DECISIONS OF THE KENTUCKY COURT OF APPEALS CONSTRUING THE KENTUCKY CONSTITUTION AND STATUTE.

For the reason that the Kentucky Court of Appeals has cited the Pierson *v.* Ill. Cent. R. R. Co., (C. C.,) 118 Fed., 342, in support and as expressive of its views of the law upon the question in issue, we quote from Judge Shiras's opinion as follows:

> "If the statutes of Iowa in providing for the leasing of a line of railway, had *in express terms* declared that the lessor company should *not* be liable for injuries resulting from the negligence of the lessee in operating the leased line, or if the supreme court of the state, in determining the construction to be placed upon the terms of the statute authorizing the leasing of the railway lines, had held that the lessor could *not* be held liable for the negligence of its lessee in the operation of its line, so that it was the settled law of the state that the lessor company could *not* be lawfully charged with liability for the negligence of the lessee in the operation of the leased railway, *then* the act of joining in one case the lessor and the lessee as defendants would justify the court in holding that such joinder was not in good faith, but must have been with the intent of thereby defeating, if possible, the re-removal existing in behalf of the real defendant to the cause of action declared on by plaintiff. On the other hand, *if, under the law of the state*, the lessor and lessee are *each* liable to anyone injured through negligence in the operation of the railway lines, *then*, of course, it could not be held that either of these parties was a nominal or sham defendant to a suit brought against them jointly, based

upon the operation of the leased railway line. If, however, the question of liability on the part of the lessor company for the results of the negligence of its lessee in the operation of the line has not been settled, either by express legislative declaration, or *by the decision of the supreme court of the state*, then it can not be justly said that a plaintiff who seeks to obtain a judgment against both the lessor and lessee for injuries caused him in the negligent operation of the cars or trains on the leased line, is open to the charge of endeavoring to fraudulently defeat the right of removal by joining a nominal or sham party as a defendant in the suit.

"In consideration of the question arising on the motion to remand in this case, the court is confined to the inquiry *whether it is the settled law of the State of Iowa that the lessor of a line of railway within the state is not liable for the negligence of its lessee in the operation of the leased line of railway?* If this question has not been finally determined, either by legislative declaration *or judicial decision*, but exists and is presented in the case as a question to be solved in the further progress of the suit, in the consideration of the rules of law applicable thereto, then this issue of the liability of the lessor company can not be said to be a sham or fraudulent issue, wrongfully injected into the case, for the sole purpose of defeating the right of removal. It is not claimed on behalf of the railway company that there is to be found in the statute law of the state any declaration expressly providing that a lessor railway company is not liable for the negligence of its lessee in the operation of the leased line, and counsel have not called to the attention of the court any decision of the supreme court of the state wherein it is ruled that such liability does not exist. * * * *The question of such liability is one of the issue of law arising upon the facts of this case, which must be determined by the court*

in which the suit is heard upon its merits; and, therefore, upon the face of the record there is presented for determination a question of the Dubuque and Sioux City Company (lessor,) a question or controversy between citizens of the same state, a question which is an open one, which the plaintiff has a right to present and which the court can not say is asserted without foundation and as a mere sham or device instituted solely to defeat the right of removal on behalf of the lessee company.

"Do the facts set forth in plaintiff's petition show that there is involved in the suit a separable controversy between the plaintiff and the Illinois Central Railroad Company, in which the Dubuque and Sioux City Railroad Company has no interest, and which can be wholly determined without affecting the rights of the Dubuque and Sioux City Railroad Company? The ground of liability against the Illinois Central Railroad Company is negligence in furnishing a badly constructed and unsafe car for the use of the employes. The ground for liability charged against the Dubuque and Sioux City Railroad Company is that the company is the owner of the line of railway between Dubuque and Sioux City; that it committed the management and operation of the line to the Illinois Central Railroad Company, as its lessee; that the lessee was negligent in operating the line, and for the results of such negligence the lessor is responsible. *The Dubuque and Sioux City Railroad Company is clearly interested in the issue of negligence in the operation of its leased line by its lessee, and on the trial of the case will be entitled to be heard on the issue.* That company has a vital interest in the question, and as the case stands, it can not be decided that the Illinois Central Railroad Company was guilty of negligence in the particular charge without affecting the interest of the Dubuque and Sioux City Railroad Company; and on the other hand, if it should be decided that

the Illinois Central Railroad Company was not guilty of the negligence charged against it, then the case would fail as to the Dubuque and Sioux City Railroad Company for the issue tendered by the plaintiff in his petition as against the latter company, is that the Illinois Central Railroad Company is guilty of negligence, causing the injury complained of, and the Dubuque and Sioux City Railroad Company, as the owner and lessor of the line of railway, is liable for the negligence of its lessee in the operation of the road. In no view that can be taken of the case, can it hold that the Dubuque and Sioux City Railroad Company had no interest in the question of negligence charged against the Illinois Central Railroad Company; and, this being so, then it can not be held that the suit presents a controversy solely between the plaintiff and the Illinois Central Railroad Company, but on the contrary, it appears that the Dubuque and Sioux City Railroad Company has a direct and vital interest in the question or controversy existing between the plaintiff and the Illinois Central Railroad Company, and the case does not, therefore, involve a separate controversy within the meaning of the removal statute; furthermore, as the plaintiff has elected to sue the defendants *jointly* for the consequence of the alleged negligence, *it is not open for either defendant to claim that the suit embraces a separable controversy within the meaning of the removal statute.* It follows that the case was not removable to this court."

In the case of Leffingwell *v.* Warren, 67 U. S., 599, Mr. Justice Swayne said:

> "*The construction given to the statute of the state by the highest tribunal of such state is regarded as part of the statute, and is binding upon the courts of the United States as the text. Leffingwell* v. *Warren, 67 U. S., 599–606; Commercial Bank* v. *Buckingham, 46 U. S.. 317; Jackson* v. *Lamphire, 28 U. S., 280.*

"It is for state courts to construe their own statutes; the Supreme Court will not review their decisions except when specially authorized by statute. Ross *v.* Duval, 13 Pet., U. S., 45.

"*The meaning of a state statute declared by the highest court of a state is conclusive upon the Supreme Court of the United States. Morley* v. *Lake Shore, etc., Ry. Co., 146 U. S., 162; Miller* v. *Swan, 150 U. S., 132; Merchants* v. *Penn. R. R. Co., 153 U. S., 380; Fallbrook Irr. Dist.* v. *Bradley, 164 U. S., 112; First Nat. Bank of Aberdeen* v. *Chehalis County, 166 U. S., 440.*

"*When the highest judicial tribunal of a state has determined the extent of the powers and liabilities of corporations created under its laws, the decision is conclusive on the national courts in all cases in which no question of general or commercial law and no question of right under the Constitution of the United States is involved. 92 Fed. Rep., 124–128; 12 C. C. A., 566; Claiborne* v. *Brooks, 111 U. S., 400; Detroit* v. *Osborne, 135 U. S., 499.*"

In the case of Gilman *v.* Sheboygan, 67 U. S., 518, it is said:

"*Acting upon the principles, recognized in its administration from the earliest period of its history, this court considers itself bound in cases like this, to follow the settled adjudications of the high state court, giving constructions to the constitution and laws of the state.*"

In the case of L. & N. R. R. Co. *v.* Kentucky, 183 U. S., 508, it is said:

"It was contended in the courts below and here that as section 218 of the Constitution of the State of Kentucky, regulating charges for transportation over different distances, is in terms a copy of the provision on the same

subject in the Interstate Commerce Act, it should be assumed that it was the intention of the Constitutional Convention of Kentucky to adopt the construction put upon that provision in the interstate commerce law by the federal courts; and that as those courts had held that the existence of actual competition of controlling force in respect to traffic important in amount might make out a dissimilarity of circumstances and conditions entitling the carrier to charge less for the longer than for the shorter haul, without any necessity to first apply to the Commission for authority so to do, that construction should have been followed at the present trial, where evidence was offered tending to show the existence of competition of that character, caused by river transportation of coal from points outside of the state.

"*Such contention might seem reasonably to have been urged in the state courts, but, as they have seen fit to disregard it, and to put a different construction upon the language employed, this court must accept the meaning of the state enactments to be that found in them by the state courts.*"

To the same effect are Luther *v.* Borden, 7 How., 40; Webster *v.* Cooper, 14 How., 505; Township of Elmwood *v.* Marcy, 92 U. S., 294; Stone *v.* Wisconsin, 94 U. S., 183; Louisville *v.* Savings Bank, 104 U. S., 471; Stutsman County *v.* Wallace, 142 U. S., 306.

In view of the foregoing decisions, we submit that this court should follow the ruling of the Kentucky Court of Appeals in the McCabe, Brooker, Sheegog and Clinger cases, and hold that the lessor, Maysville and Big Sandy Railroad Company, is jointly liable to defendant in error for the negligence of its lessee, the Chesapeake and Ohio Railway Company, in causing the death of her intestate in operating its railroad.

(*f*)

BECAUSE CONGRESS, WHATEVER IT MIGHT DO, HAS NOT BY THE "REMOVAL ACT" CONFERRED UPON THE UNITED STATES CIRCUIT COURTS JURISDICTION WHERE THERE IS A PROPER JOINDER OF A RESIDENT WITH A NON-RESIDENT DEFENDANT, ACCORDING TO THE SETTLED LAW OF THE STATE; ALTHOUGH, ACCORDING TO THE LAW, AS ADMINISTERED THEREIN, THE UNITED STATES CIRCUIT COURTS, WHEN ENTITLED TO JURISDICTION, WOULD, UPON THE MERITS, HOLD NO CAUSE OF ACTION TO EXIST AGAINST THE RESIDENT DEFENDANT.

But whether the ground of the decision in the McCabe case was, or was not, the construction of the state constitution and statute, is immaterial, inasmuch as the settled rule of law in Kentucky is that the Maysville and Big Sandy Railroad Company is jointly liable with the Chesapeake and Ohio Railway Company for its torts in the operation of the road; and, therefore, the case at bar is clearly within the rule, as well as within the reason for the rule, in the case of Alabama, G. S. R. R. Co. *v.* Thompson, 200 U. S., 219, where it is said:

> "In good faith, so far as appears in the record, the plaintiff sought the determination of his rights, in the state court, by the filing of the declaration in which he alleged a joint cause of action.
>
> "Does this become a separable controversy within the meaning of the act of Congress, because the plaintiff has misconceived his cause of action, and had no right to prosecute the defendants jointly? We think, in the light of adjudications above cited from this court, *it does not.* Upon the *face of the complaint*—the only pleading filed

in the case—the action is *joint*. *It may be* that the state court will hold it *not* to be so. *It may be* (which we are not called upon to decide now) that *this* court would so determine, if the matter shall be presented in a case of which it has jurisdiction. But *this* does not change the *character* of the action which the plaintiff has seen fit to bring, nor change an *alleged joint* cause of action into a separable controversy *for the purpose of removal*. The case can not be removed, unless it is one which presents a separable controversy wholly between citizens of different states. In determining this question, the law looks to the case made in the pleadings, and determines whether the state court shall be required to surrender its jurisdiction to the federal court.

"Congress has *not said*, whatever it *might* do, that controversies between citizens of different states *shall be removable* wherein it is sought, *contrary* to the law, as administered in the federal courts, to hold the citizens of another state to *joint* liability in tort with the citizens of the state where the action is brought.

"The fact that the state court may have a different view from the courts of the United States of the common law, as to the *character* of such actions and the right to prosecute them *in form* joint, as well as several, *affords no ground of removal*. The federal courts, in some states, hold a different rule as to the doctrine of fellow-servants from that administered in the state courts, and in other ways administer the common law, according to their own views. *It has not been suggested that a right of removal should arise from such differences. No more has Congress given the right where the state permits an action to be prosecuted jointly, which will be held to be several only in the courts of the United States.*"

In the case of Cincinnati, N. O. & T. P. R. R. Co. *v.* Bohon, 200 U. S., 226, it is said:

> "An action for death by negligence, is regulated by the Kentucky constitution and statutes. Section 241 of the constitution provides: 'Whenever the death of a person shall result from an injury inflicted by negligence or wrongful act, then, in every such case, damages may be recovered for such death from the *corporations* and persons so causing the same.'
>
> "Section 6, of the Kentucky statute, is as follows: 'Whenever the death of a person shall result from an injury inflicted by negligence or wrongful act, then, in every such case, damages may be recovered for such death from the person or persons, company or companies, *corporation or corporations*, their agents or servants, causing the same, and when the act is willful or the negligence gross, punitive damages may be recovered, and the action to recover such damages shall be prosecuted by the personal representative of the deceased.'
>
> "This statute undertakes to give an action for negligence against the *companies or corporations* responsible therefor and their agents or servants causing the same.
>
> "We then have a case in which the extent of the right to recover damages for negligence is prescribed by the constitution and statutes of the State of Kentucky, *and which the courts of that state have construed to give a joint cause of action against the corporation and its agents or servants causing the same.* In a recent case, this court had occasion to deal with a question of removal under the separable clause (Southern R. R. Co. *v.* Carson, 194 U. S., 136,) on a writ of error to the supreme court of South Carolina. While the case did not show an attempt to remove, the discussion of the subject by the chief

justice strongly intimates that if the action was properly joined, *in the forum in which it was being prosecuted*, it could not be removed as a separable controversy, under the act of Congress. We have under consideration an action for tort, which, by the constitution and laws of the state, *as interpreted by the highest court of the state*, gives a *joint* remedy against master and servant to recover for negligent injuries. This court has repeatedly held that a separable controversy must be shown upon the face of the petition or declaration, and that the defendant has no right to say that an action shall be several which the plaintiff *elects* to make *joint*.

"A state has an unquestionable right by its constitution and laws to regulate actions for negligence, and where it has provided that the plaintiff in such cases may proceed *jointly* or severally against those liable for the injury, and the plaintiff, in the due course of law and in good faith, has filed a petition electing to sue for a *joint* recovery *given by the laws of the state*, we know of nothing in a federal removal statute which will convert such action into a *separable* controversy *for the purpose of removal*, because of the presence of a non-resident defendant therein, properly joined in an action under the constitution and laws of that state wherein it is conducting its operations, and is duly served with process."

V.

THE JUDGMENT OF THE UNITED STATES CIRCUIT COURT FOR THE EASTERN DISTRICT OF KENTUCKY PLEAD IN BAR HEREIN IS A NULLITY.

The case of Dowell *v.* Appellgate, 152 U. S., 327,—a case involving the construction of acts of Congress and not merely

the question of diversity of citizenship,—is relied upon by appellants to support their plea in bar; but the facts in that case are unlike the facts in this case. The reason for holding the plea good in that case, was that—

> "Upon the face of the record of the suit in the federal court, the case depended, in part, *upon the construction of certain acts of Congress*, and upon the effect of the alleged fraudulent omission of the grantors in the deeds attacked to conform *to those acts.*"

In the case of Des Moines Navigation Co. *v.* Iowa Homestead Co., 123 U. S., 552, there was no motion to remand, nor any objection to the jurisdiction; but the parties appeared and litigated the questions, and the judgment of the circuit court was reviewed by this court. That was the judgment plead in bar. How different the facts in the case at bar wherein there was no waiver of jurisdiction. For the removal statute does not authorize the United States Circuit Courts to assume jurisdiction where they have none, especially where objection is made thereto. Now the contention of defendant in error is that the Mason Circuit Court did have undoubted jurisdiction of the case; that said court could not be divested of its jurisdiction by removal of the cause into the federal court in any manner other than as provided by the statute; that no inquiry into or ascertainment of facts not shown by the record at the time of removal of the cause can be presumed, for the transfer of jurisdiction from one court to the other can not take steps until the record shows the steps necessary to effect the transfer have been taken in accordance with the law, and, as two courts can not have jurisdiction of the same cause at the same time, *no act of the parties*, or *proceedings in the federal court* can

create *federal* jurisdiction until the state court has been divested of *its* jurisdiction. In the case of Dexter, Horton & Co. *v.* V. Sayward, 84 Fed., 299, it is said:

> "The defendants are fortified in their position by decisions of the supreme court holding that in cases removed from state courts into United States Circuit Courts the facts essential to the right of removal must be shown affirmatively by the record, before the removal takes place; *that a defective record* deprives a United States Circuit Court of jurisdiction of a case removed from a state court, *even though the necessary facts do exist;* and its final judgment, *although rendered after the parties have voluntarily submitted their cause to its determination*, is *coram non judice.* Amory *v.* Amory, 95 U. S., 186; Insurance Co. *v.* Pechner, Id., 183; Stone *v.* South Carolina, 117 U. S., 430; 6 Sup. Ct., 799; Carson *v.* Hyatt, 118 U. S., 279; 6 Sup. Ct., 1050; Metcalf *v.* Watertown, 128 U. S., 586; 9 Supt. Ct., 173; Stevens *v.* Nichols, 130 U. S., 230; 9 Sup. Ct., 518; Crehore *v.* Railway Co., 131 U. S., 240; 9 Sup. Ct., 692; Jackson *v.* Allen, 132 U. S., 27; 10 Sup. Ct., 9; Graves *v.* Corbin, 132 U. S., 571; 10 Sup. Ct., 196. The argument for the defense also assumes that all removed cases, where the record does not show affirmatively that the United States court did have jurisdiction, are in the same situation as cases wherein the record does show affirmatively that the court did not have jurisdiction. It is insisted that *there is a wise distinction* to be observed between causes commenced originally in a United States Circuit Court and cases which were originally commenced in a state court; that in the former, if the record is silent, jurisdictional facts may be presumed to exist, *but in the latter* the federal jurisdiction *depends entirely upon a sufficient record showing affirmatively the facts necessary to*

warrant removal of the cause from the state court into the federal court. And it is shown by the decisions of the Supreme Court that, where it appears affirmatively by its own record that a court did not have jurisdiction of the cause, its judgment is not merely voidable, *but is an absolute nullity.* Galpin *v.* Page, 18 Wall., 350; Windsor *v.* McVeigh, 93 U. S., 277; Pennoyer *v.* Neff, 95 U. S., 714; Settlemeir *v.* Sullivan, 97 U. S., 444; In re Ayers, 123 U. S., 443; 8 Sup. Ct., 164; In re Sawyer, 124 U. S., 200; 8 Sup. Ct., 482; Hovey *v.* Elliott, 167 U. S., 409; 17 Sup. Ct., 841. It is also shown by the decisions of the Supreme Court that, where the plaintiff sues as assignee of a chose in action, if the federal jurisdiction depends upon diversity of citizenship of the parties, it is necessary to show the citizenship of the assignors as well as the parties to the suit, and, unless it appears by the record that the suit might have been prosecuted in the federal court if no assignment or transfer of the cause of action had been made, the record is insufficient to show jurisdiction in a federal court. Metcalf *v.* Watertown, 128 U. S., 586; 9 Sup. Ct., 173; Parker *v.* Ormsby, 141 U. S., 81; 11 Sup. Ct., 912; Plant Inv. Co. *v.* Jacksonville, T. & K. W. Ry. Co., 152 U. S., 71; 14 Sup. Ct., 483. In the case of Elliott *v.* Piersol, 1 Pet., 328–342, the Supreme Court gave this rule:

" 'Where a court has jurisdiction, it has a right to decide every question which occurs in the cause; and, whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court. But, if it acts without authority, its judgment and orders are regarded as nullities. *They are not voidable, but simply void, and form no bar to a recovery sought even prior to a reversal in opposition to them. They constitute no justification, and all persons concerned in executing such judgments or sentences are considered in law as trespassers.*'

"That decision has been cited many times in the subsequent decisions of the Supreme Court, and the rule in the same words has been repeated and approved in Hickey *v.* Stewart, 3 How., 750–763; Williamson *v.* Berry, 8 How., 495–565; Thompson *v.* Whitman, 18 Wall., 457–471; Re Sawyer, 124 U. S., 200–225; 8 Sup. Ct., 482. The rule, as quoted and as applied in the cases referred to, is a mandatory declaration of the law by the highest court in the country, and is broad enough to sweep every judgment of every court of every rank assuming to act without lawful jurisdiction of the parties whose rights are involved or of the subject-matter of the controversy, whether the defect of jurisdiction appears affirmatively on the face of the record or is shown in a collateral proceeding by proof *aliunde*. In the recent decision of the Supreme Court in the case of Guarantee Trust & Safe Deposit Co. *v.* Green Cove Springs & M. R. Co., 139 U. S., 137–151; 11 Sup. Ct., 516, Mr. Justice Brown, in the opinion of the court, quotes with approval from the opinion in Williamson *v.* Berry, as follows:

"'*It is an equally settled rule of jurisprudence that the jurisdiction of any court exercising authority over* a subject may be inquired into in every other court, when the proceedings in the former are relied upon and brought before the latter by a party claiming the benefit of such proceedings. The rule prevails whether the decree or judgment has been given in a court of admiralty, chancery, ecclesiastical court, or court of common law.'"

VI.

THE JUDGMENT IN QUESTION SHOULD BE AFFIRMED WITH DAMAGES.

Seven years have now passed since Peter McCabe's widow brought this suit for his death; and every obstruction known

to the law has been interposed to prevent a recovery and delay collection of the judgment. Not the least, indeed, has been the prosecution of this writ of error in total disregard of the law as settled by former adjudications of this court; the correctness and applicability of which to this case are clearly beyond question. This is, therefore, a delay case under Rule 23 of this court. Rev. Stat., Sec. 1010; Pennywit *v.* Eaton, 15 Wall., 382; Texas, etc., Ry. Co. *v.* Volk, 151 U. S., 79; Gregory, etc., Mining Co. *v.* Starr, 141 U. S., 227; Insurance Co. *v.* Huchburgers, 12 Wall., 166; Hennessy *v.* Sheldon, 12 Wall., 440.

In the case of Whitney *v.* Cook, 99 U. S., 607, it is said:

> "*Our experience teaches us that the only way to discourage frivilous appeals and writs of error is by the use of our power to award damages, and we think this a proper case in which to say that hereafter more attention will be given to that subject, and the rule enforced, both according to its letter and spirit. Parties should not be subject to the delay of proceedings for review in this court without reasonable cause, and our power to make compensation to some extent for the loss occasioned by an unwarranted delay ought not to be overlooked.*"

Respectfully submitted,

Allan D. Cole

Attorney for Defendant in Error.

W. T. Cole,
Of Counsel.

Supreme Court of the United States

OCTOBER TERM, 1919

No. [redacted]

Chesapeake & Ohio Railway Company and
Hocking Valley Railway Company,

Plaintiffs in Error,

vs.

Daniel G. McCabe, Administrator
of Peter McCabe, Deceased,

Defendant in Error.

WRIT OF ERROR TO THE COURT OF APPEALS OF KENTUCKY

REPLY BRIEF FOR PLAINTIFFS IN ERROR

E. C. WORTHINGTON,
Counsel for Plaintiffs in Error

W. B. GOODALL,
Of Counsel

Supreme Court of the United States

OCTOBER TERM, 1908

No. 89

Chesapeake & Ohio Railway Company and Maysville & Big Sandy Railroad Company, - - - - *Plaintiffs in Error,*

vs.

Emma R. McCabe, Administratrix of Peter McCabe, deceased, - - *Defendant in Error.*

REPLY BRIEF FOR PLAINTIFFS IN ERROR

May it Please the Court:

The first point made in the brief for defendant in error is that the present writ of error is taken to the final judgment of the Kentucky Court of Appeals affirming the judgment of the Mason Circuit Court, awarding to her $2,500.00 in damages, instead of to the judgment of the Kentucky Court of Appeals of March 5, 1902, reversing the judgment of the Mason Circuit Court ordering the action removed to the United States Circuit Court.

This judgment of March 5, 1902, remanded the case to the Mason Circuit Court for further proceedings consistent with the opinion.

It has been often decided by this court that the judgment of the highest court of a state *reversing* a judgment of a lower court and remanding the action for further proceedings is not a final judgment within the meaning of *Sec. 709, Rev. Stat. U. S. Bostwick* v. *Brinkerhoff, 106 U. S., 31.*

The circumstance that on the last appeal the Court of Appeals might consider itself bound by its judgment on the former appeal does not make its former judgment the "final judgment" in the suit, within the meaning of *Sec. 709, Rev. Stat. U. S. Great Western Telegraph Co.* v. *Burnham, 162 U. S., 339.*

This court in *Missouri Pacific R. Co.* v. *Fitzgerald, 160 U. S., 582,* says:

> "If a state court proceeds to judgment in a cause notwithstanding an application for removal, its ruling in retaining the case will be reviewable here after final judgment, under *United States Revised Statutes, Sec. 709.*"

See also *Cincinnati Street Railway Co.* v. *Snell, 179 U. S., 398.*

Furthermore, the principal question involved on this writ of error, to-wit, whether the judgment of the federal court refusing to remand the case was binding on the state court, was not in the case at all when the judgment of reversal of March 5, 1902, was rendered by the Court of Appeals of Kentucky. The motion to remand the case to the state court was not overruled by the federal court until October 19, 1903, and this

judgment of the federal court was not pleaded in the state court until November 17, 1903.

The next point made is that the petition for removal was not filed in time. The order of the state court recites that it was filed "within the time provided by law." [See page 16, printed transcript.] The Kentucky Court of Appeals did not base its judgment of reversal on the ground that the petition for removal was not filed in time, but upon the ground that the action was not a removable one. The United States Circuit Court took jurisdiction of the case and refused to remand it, though moved to do so, and rendered a judgment therein.

The time of filing a removal petition is not a fact essential to the jurisdiction of the federal court. *Martin's Admr.* v. *Baltimore & Ohio R. Co., 151 U. S., 686.*

The recital in the judgment of the Mason Circuit Court that the petition for removal was filed "within the time provided by law," is a record recital of a fact, and imports absolute verity. It is not contradicted by any fact otherwise shown on the record. The law of Kentucky requires defense to a suit to be made "on the day on which the case is set for trial." *Civil Code, Sec. 102.* There is nothing in the record to show that the petition for removal was not filed on or before the day the case was set for trial, or to impeach the record statement in the order of removal that it was filed "within the time provided by law."

The third point made is that the petition for removal failed to show that the Chesapeake and Ohio Railway Company had power under its Virginia charter to accept the lease to it made by the Maysville and Big Sandy Railroad Company.

Whether the action was removable depends solely upon the cause of action alleged in the original petition, and not upon the allegations of the petition for removal. The petition simply states that "*under the laws of Kentucky* said lease and transfer was and is illegal, ultra vires and void."

This is not an allegation that the lease was ultra vires under the laws of *Virginia*. It amounts, *at most*, to a statement that the laws of *Kentucky* did not authorize the making of said lease. It is not a statement that the laws of *Virginia* did not authorize the acceptance of the lease. The Kentucky Court of Appeals decide that said lease was not *ultra vires* under the laws of Kentucky. There being no allegation that the charter of the Chesapeake and Ohio Railway Company did not confer on it power to *accept* the lease, the legal presumption is that it had such power. *Jones* v. *Bank of Tennessee, 8 B. Mon., 122; 6 Thompson on Corporations, Sec. 7883; 5 Thompson on Corporations, Sec. 5967.*

This court, in *Ohio & Mississippi Ry. Co.* v. *McCarthey, 96 U. S., 258*, says:

> "When a contract is not on its face necessarily beyond the scope of the power of the corporation by which it was made, it will, in the absence of proof to the contrary, be presumed to be valid. Corporations are presumed to contract within their powers."

In *Southern Express Co.* v. *Western North Carolina R. Co., 99 U. S., 191*, where the point was made that it was not

alleged either that the plaintiff, the express company, or the defendant, the railway company, had power to make the contract sued on, this court, in overruling the objection, said:

> "The contract of a corporation is presumed to be *infra vires*, until the contrary is made to appear. * * * * Adequate capacity on the part of the railway company to make the contract is to be presumed in like manner."

Moreover, the allegation that the lease was "illegal, ultra vires and void," is the allegation of a legal conclusion merely, and is not sufficient to put in issue either the power of the lessor company to make the lease, or the power of the lessee to accept the lease. *Jones* v. *Bank of Tennessee*, *8 B. Mon.*, *122*. That was a suit brought by a Tennessee corporation in the courts of Kentucky, on a bond alleged to have been discounted to it. The defendant pleaded that "plaintiff had no corporate powers granted to them in their charter, to discount or acquire title to the writing sued on, or to commence or prosecute a suit on it in this state." In deciding that such a plea was insufficient the Court of Appeals of Kentucky said:

> "These pleas allege deductions of law instead of *facts*. If the provisions in the charter conferred no such authority, it could only be shown legally, by setting forth the charter itself. The law would then determine its effect and the extent of the powers conferred by it. The pleas contain merely the conclusions of the defendants in relation to the extent of these powers, and assume the decision of a question of law, instead of averring matters of fact."

There is nothing in the opinion of the Kentucky Court of Appeals [pages 18 to 24, inclusive, printed record] to authorize the statement on page 15 of the brief of defendant in error, that "the Kentucky Court of Appeals held, notwithstanding

these conclusions of the pleader, that the Chesapeake and Ohio Railway Company was merely an *operating agent* and *could not* as a matter of law take exclusive possession and control of its lessor's property;" nor the statement on page 25, "that the lessor still retains paramount authority as *master* and the lessee is simply its operating agent or *servant.*" On the contrary, that court quotes the statement in the petition of defendant in error that "the Maysville and Big Sandy Railroad Company *leased* and *transferred* its entire line of road to the Chesapeake and Ohio Railway Company, and that the latter has since that time been in the exclusive possession and control of it," and then quotes the language of the amendment to the charter of the Maysville and Big Sandy Railroad Company, passed February 17, 1866, and says: "Thus power was granted to it to make the contract with the Chesapeake and Ohio Railway Company above referred to." It holds the Chesapeake and Ohio Railway Company liable notwithstanding "exclusive possession and control" of the leased road was thus *rightfully* transferred by it, on the sole ground that the statute which granted the power to thus transfer possession and control of the leased road did not grant any *exemption* from liability for the torts of the lessee in operating the leased road.

To call the lessee an "operating agent" does not help to show that the liability of the lessor for the torts of its lessee is based on the doctrine of *respondeat superior.* It does not show that the lessor *controlled*, or had the right to *control*, the lessee in the operation of the road. Unless the *right of control* exists there is no liability under the doctrine of *respondeat superior.*

Counsel for defendant in error, on page 26 of his brief, in quoting from the opinion of the Court of Appeals of Kentucky in this case where the court says, "thus power was granted to it to make the *contract* with the Chesapeake and Ohio Railway Company above referred to," inadvertently uses the word "contracts" in the plural, instead of "contract" in the singular. The use of the plural word "contracts" might convey the idea that the court was not alluding to the particular contract of lease that was made.

There is no room for any confusion on that subject. The court uses the word "contract," in the singular, and not the plural, "contracts." [See page 21, printed transcript.]

This opinion is published in *112 Ky., 86*, and in *66 S. W. Rep., 1054*, and in *23 Ky. L. Rep., 2328*, and in the printed record on this writ of error. In none of them is the plural "contracts" used. The opinion as published in *112 Ky.* and *66 S. W. Rep.* is the opinion as first delivered, and not the opinion as corrected on petition for rehearing, and certified to this court on this writ of error. But none of these four publications obscure the court's meaning by using the plural word "contracts" in the sentence mentioned. What the court decided was that the Act of February, 1866, gave to the Maysville and Big Sandy Railroad Company power to make the particular contract with the Chesapeake and Ohio Railway Company that was made, to-wit, the one alleged to have been made by defendant in error in her original petition and quoted by the court in a preceding part of its opinion.

The fourth contention in the brief for defendant in error is that her petition states a joint cause of action against plaintiffs in error. Whether it does state a *joint* cause of action is a question I have discussed in my original brief.

Whether a suit against A for a tort committed by him, and against B on his contract to be liable for A's tort, involves a separable controversy must, in its last analysis, depend upon the proper construction of the Act of Congress authorizing removals. Is there in such a suit a controversy which is wholly between the plaintiff and A, and which can be fully determined as between them? That question necessarily involves the construction of the Act of Congress. The circumstance that the laws of a state might allow A and B, in the case put, to be sued together in one action, could not foreclose the inquiry whether in such an action there is a controversy which is wholly between citizens of different states, and which can be fully determined as between them, within the meaning of Section 2 of the Act of 1887–88.

The clear cut distinction between the case of *Alabama and Great Southern R. Co.* v. *Thompson*, *200 U. S.*, *218*, and the present case is this: In that case the plaintiff's petition *stated* a joint cause of action against the two defendants, the master and the servant. In the present case, the petition of defendant in error does not *state* a joint cause of action against the two plaintiffs in error. It may be, that the pleader *thought* he was stating a joint cause of action against them, and his manner of statement would indicate that he did so think. But the *facts* which he states show that the cause of action is not joint.

Surely a right of removal can not hinge on the question whether a pleader thinks, or does not think, that the cause of action he is stating is *joint*.

These several contentions made by counsel for defendant in error in his brief, even if it be conceded that they are all sound, could have no bearing whatever upon the principal question involved on this writ of error; which is,—Was the judgment of the Circuit Court of the United States, refusing to remand the case to the Mason Circuit Court, a valid judgment, and hence binding on defendant in error, even if erroneous? Or, was the judgment of the United States Circuit Court absolutely void? I submit, that the decisions of this court in *Dowell* v. *Applegate*, *152 U. S.*, *327*, and *Des Moines Navigation Co.* v. *Iowa Homestead Co.*, *123 U. S.*, *552*, conclusively settle that question. The only authority cited to the contrary in the brief of counsel is *Dexter* v. *Sayward*, *84 Fed.*, *299*. And that case not only does not support the contention for which it is cited, but it is in square conflict therewith. It cites, and follows, *Dowell* v. *Applegate* and *Des Moines Navigation Co.* v. *Iowa Homestead Co.*, and holds that the judgment of a federal court in a case wrongfully removed to it, and which ought to have been remanded but was not, is *not* void, but valid and binding on the parties to it.

It is not essential, in order to entitle plaintiffs in error to a reversal in this case, that they should sustain the proposition

that the judgment of the Mason Circuit Court is *void*. If it can be assumed, it spite of the unreversed judgment of the federal court to the contrary, that the cause was not a removable one, then the jurisdiction of the state court was not divested when the petition for removal was filed; and it *may be* that it was not divested when the judgment of the federal court sustaining its jurisdiction was rendered, nor when said judgment was afterwards pleaded in the state court. But when the state court decided against the validity of that plea, its judgment was *erroneous*, (even if not void,) inasmuch as it failed to give full force and credit to a judgment of a court of the United States.

The chief complaint on this writ of error is of the refusal of the state court to sustain a plea of estoppel by a former judgment of the federal court. This was *error*, even if the jurisdiction of the state court was never divested.

To illustrate: A sues B in a court of Ohio, on a promissory note for $100.00. B pleads payment. This plea is sustained and judgment rendered in favor of B. A afterward sues B on the same note in a court in Kentucky. B pleads the judgment of the Ohio court in bar. The Kentucky court sustains a demurrer to the plea, and renders judgment in favor of A for the amount of the note. Obviously this judgment is not void, but it is palpably *erroneous*.

To determine whether the case was removable or not was certainly within the jurisdiction of the federal court. *Dowell* v. *Applegate, 152 U. S., 327.* Its decision of that question was the exercise of a jurisdiction expressly conferred upon it by a statute of the United States, *Sec. 5 of the Act of 1875.*

It was therefore binding on the *parties* to it, whether right or wrong, as long as it remained unreversed. It *may be* that the state court had *jurisdiction* to decide that the judgment of the federal court was not binding on the parties to it. It *may be* that the state court's action in thus ignoring the judgment of the federal court was in exercise of *its* jurisdiction granted by the state statutes. But whether this action of the *state* court was erroneous is the very question now directly involved on the present writ of error. Whether the federal court erred is not involved.

But, I submit, that this line of argument attacks the question wrong end foremost. Until the judgment of the federal court is gotten behind in some way, the question whether the cause was a removable one is not reached. The judgment of the federal court closed that question. It could be reopened only by a writ of error to review that judgment.

The true way to look at the matter is, I submit, *this:* The state court's judgment is *void*, for the reason that its jurisdiction was divested, when the petition for removal was filed. This must be taken as true *now*, because the federal court has so adjudged, and that judgment is still in force, and precludes any inquiry as to its correctness, either in the Mason Circuit Court, or in the Court of Appeals of Kentucky, or in this court on this writ of error to review the judgment of the Court of Appeals of Kentucky. The only way to correct the error, (if it be such,) is by writ of error to review the judgment of the federal court.

It is respectfully submitted that the judgment of the Court of Appeals of Kentucky affirming the judgment of the Mason Circuit Court is erroneous and should be reversed.

E. L. WORTHINGTON,
Counsel for Plaintiffs in Error.

W. D. COCHRAN,
Of Counsel.

In the
Supreme Court of the United States

OCTOBER TERM, 19[illegible]

No. [illegible] 89

[illegible] and [illegible] Railway Company, etc.,

Plaintiffs in Error,

vs.

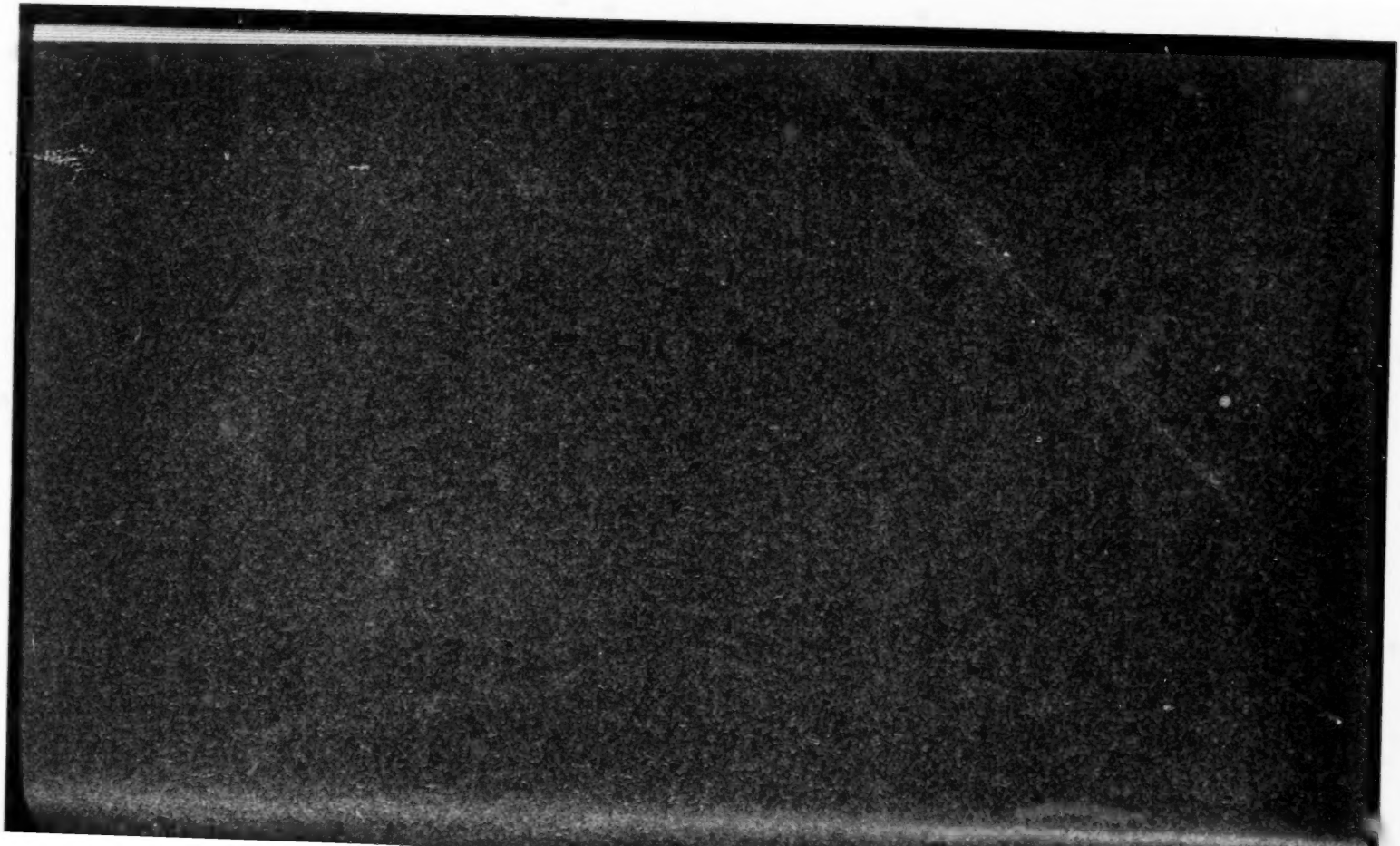
[illegible], Administratrix of [illegible], Deceased,

Defendant in Error.

MOTION TO ADVANCE UNDER RULE 30

A. D. COLE,

Counsel for Defendant in Error.



IN THE

Supreme Court of the United States

OCTOBER TERM, 1907

NO. 320

Maysville and Big Sandy Railroad Company, etc.,

Plaintiffs in Error,

vs.

Emma R. McCabe, Administratrix of Peter McCabe, Deceased,

Defendant in Error.

MOTION TO ADVANCE UNDER RULE 32

Comes now the defendant in error herein, Emma R. McCabe, as Administratrix of Peter McCabe, deceased, in her own proper person, and moves the Court to advance the above-entitled cause, pursuant to Rule 32, because the only question in issue is whether there was such diversity of citizenship in the joinder of the lessor domestic corporation with the lessee foreign corporation, that under the Removal Statute, the Mason

Circuit Court had jurisdiction to render the judgment or decree, affirmed by the Court of Appeals of Kentucky, from which latter court's judgment the writ of error of the plaintiffs in error herein purports to have been prosecuted to this court: or whether jurisdiction belonged to the United States Circuit Court for the Eastern District of Kentucky.

EMMA R. McCABE,

As Administratrix of Peter McCabe, deceased,

Defendant in Error.

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die O. Childe.

Emma R. X her mark McCabe
as Administratrix of
Peter McCabe, deceased
Defendant in Error

BRIEF OF ARGUMENT.

May it Please the Court:

The only question in issue herein is the question of jurisdiction of the court below. Prior to the amendment of Rule 32, this court held that a writ of error to a State court which had refused a motion to remove, might be advanced as within the spirit, although not within the letter of said Rule, regarding advancement of causes remanded by the Circuit Court. *Burlington C. R. & N. Co.* vs. *Dunn, 121 U. S., 182.*

Since the amendment of Rule 32, this case is entitled to be advanced under section 5, Act of 1891, as being also within the letter thereof. *Aspen Min. & Sm. Co.* vs. *Billings, 150 U. S., 31.*

Respectfully submitted,

EMMA R. McCABE,

As Administratrix of Peter McCabe, deceased,

Defendant in Error.

Attest:
Lydia P. Childs,
A. D. Cole

Emma R. McCabe
her
mark
as Administratrix of
Peter McCabe, deceased
Defendant in Error

CHESAPEAKE AND OHIO RAILWAY COMPANY *v.* MCCABE, ADMINISTRATRIX.

ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

No. 89. Argued January 25, 1909.—Decided April 5, 1909.

Where the case goes more than once to the highest court of the State only the last judgment is the final one.

Where the highest court of the State reverses an order of an inferior state court removing a cause and remands the case to the state court for trial, and, after trial and verdict for plaintiff, the judgment is sustained by the highest court, the last judgment is the only final one to which the writ of error will run from this court; defendant cannot

prosecute a writ of error to the judgment remanding the cause. *Schlosser* v. *Hemphill*, 198 U. S. 173.

The United States Circuit Court has jurisdiction to determine for itself the removability of a cause and may take jurisdiction thereof and protect such jurisdiction even though the state court refuse to make the removal order; and a final judgment, rendered by and under such conditions by the Circuit Court, cannot be reviewed by the state court, but such judgment is binding on the state court until reversed by this court.

While a petitioner, if the state court denies his petition for removal, may remain in that court and bring the case here for review on writ of error after final judgment, he is not obliged so to do, but may file the record in the Circuit Court, and that court has jurisdiction to determine the question of removability and, notwithstanding § 720, Rev. Stat., it may protect its jurisdiction by injunction against further proceedings in the state court. *Traction Co.* v. *Mining Co.*, 196 U. S. 239.

A judgment rendered by the Circuit Court under such conditions is not void even if jurisdiction be improperly assumed and retained, as the jurisdictional question can be reviewed by this court, and, until reversed, the judgment is binding on the state court and cannot be treated as a nullity. *Dowell* v. *Appelgate*, 152 U. S. 327.

THIS action was brought September 27, 1901, by the defendant in error in the Mason County Circuit Court of Kentucky against the Chesapeake and Ohio Railway Company, a Virginia corporation, and the Maysville and Big Sandy Railroad Company of Kentucky, to recover damages for the death of her intestate, by the negligence, as it is alleged, of the Chesapeake and Ohio Railway Company, in operating one of its trains over a railroad track, which had been leased to it by the other company.

The allegations of the petition in substance are that the intestate of defendant in error received injuries which caused his death by being negligently run into by a train operated by the Chesapeake and Ohio Railway Company. And negligence is charged against the Maysville and Big Sandy Railroad Company, in permitting its tracks to be used by the other company. It alleges that more than twelve months before the injuries to her intestate the Maysville and Big Sandy Railroad Company

leased and transferred its entire line to the Chesapeake and Ohio Railway Company, and that the latter has had since that time the exclusive possession and control of it; that by the laws of Kentucky the lease and transfer were *ultra vires* and void; that in December, 1893, under § 211 of the constitution of Kentucky, and under § 841 of the statute of the State, the Chesapeake and Ohio Railway Company became a corporation, citizen and resident of the State, by filing in the office of the Secretary of State, and in the office of the Railroad Commissioner, copies of its articles of incorporation, and that thereupon a certificate of incorporation was issued to it by the Secretary of State. The petition further alleges that the railroad track was laid in Third street in Maysville under an ordinance from the city authorities; that the railroad occupied the whole street, so as to render it unfit for travel by wagons or vehicles; that the city authorities were without power to authorize such use of the street, and that the ordinance was void, and the operation of the trains on the street was illegal.

On December 11, 1901, the Chesapeake and Ohio Railway Company filed a petition to remove the action to the Circuit Court of the United States for the Eastern District of Kentucky. The petition set up that the Chesapeake and Ohio Railway Company was a Virginia corporation; that the suit was of a civil nature; that the amount involved exceeded $2,000; that in the suit there was a controversy which was wholly between citizens of different States, to wit, between the Chesapeake and Ohio Railway Company, a citizen of Virginia, and the plaintiff in the suit, who was a citizen of the State of Kentucky. It was further alleged that the Maysville and Big Sandy Railroad Company was not a necessary party to the suit, but was made a defendant therein "for the sole and simple purpose" of preventing the Chesapeake and Ohio Railway Company from removing the suit to the Circuit Court of the United States, and thereby unlawfully, wrongfully and fraudulently depriving it of a right conferred by the Constitution and laws of the United States.

Petitioner quotes all the allegations of the plaintiff connecting the Maysville and Big Sandy Company with liability, and avers that "each and all of them" were "untrue and palpably so, and were known to the plaintiff to be untrue" when made in the original and amended petition. Petitioner alleges that by reason of its charter and amendments thereto, and partly of the act of February 17, 1866, entitled "An act authorizing the sale of the Maysville and Big Sandy Railroad, and providing for the organization of a new company under its charter to construct said road," (Session Acts, 1866, page 644), and of the General Laws of the State of Kentucky, the Maysville and Big Sandy Railroad Company, which petitioner states was reorganized under said act and laws, before the making of said contract and lease, had full authority to make the same, and that petitioner was operating the railway under the same at the time of the injury complained of. And the petitioner finally "charges and avers that the allegations of the plaintiff's petition and amended petition, hereinbefore recited and controverted, were made and its co-defendant was made defendant to this action, and was sued for the injury complained of herein, for the sole and fraudulent purpose of depriving this defendant of the right to remove this action to the Federal court for the Eastern District of Kentucky, and of depriving that court of its jurisdiction."

The petition was granted and the clerk of the court on the fourteenth of December, 1901, was directed to make up the record of said cause for transmission to the Circuit Court of the United States for the Eastern District of Kentucky. The plaintiff in the case excepted to the order and subsequently made a motion to set it aside, which was denied. An appeal from the order to the Court of Appeals was immediately granted, which court, on the fifth of March, 1902, reversed the order and remanded the case for trial. 112 Kentucky, 186. The trial was had and the jury instructed by the court to find in favor of the defendant. This judgment was reversed by the Court of Appeals. 28 Ky. Law Rep. 536. Another trial was had, result-

ing in a verdict and judgment for plaintiff in the sum of $2,500. The judgment was sustained by the Court of Appeals. 30 Ky. Law Rep. 1009. To this judgment the writ of error in the present case was taken.

The record further shows that after the appeal from the order of removal plaintiff in error filed a transcript of the record in the Circuit Court of the United States for the Eastern District of Kentucky, and the case was duly docketed. After the decision of the Court of Appeals of Kentucky, reversing the order of the Mason County Circuit Court, removing the case to the Circuit Court of the United States, plaintiff filed in the latter court a motion to remand the case to the state court. On October 19, 1903, that motion was overruled.

On April 4, 1904, the Chesapeake and Ohio Railway Company filed in the Circuit Court of the United States its answer to the petition of the plaintiff, and on motion of the latter the cause was set down for trial April 12. On the latter date the Chesapeake and Ohio Railway Company moved for judgment of dismissal of the suit on the face of the pleadings. This motion was granted, and also a demurrer of the Maysville and Big Sandy Railroad Company was sustained to the petitions and judgment rendered.

On November 17, 1903, plaintiff in error offered for filing an answer in the Mason County Circuit Court, which set up the petition for removal, and the order thereon removing the cause to the Circuit Court of the United States, the filing in the latter court of the transcript of the record and the docketing of the cause the thirteenth of January, 1902. The answer alleged also that on motion of the defendants a rule was issued against the plaintiff to show cause why she should not be required to give bond for costs or make a deposit of money in lieu thereof, that the plaintiff filed a response thereto, and after the decision of the Court of Appeals of Kentucky, reversing the order removing the cause to the Circuit Court of the United States appeared by her counsel in the latter court, filed a petition to remand the case to the state court, a brief in support thereof, the opinion

of the Court of Appeals, and that on the nineteenth of October, 1903, the motion was denied.

The motion to file the answer was denied by the state court, but by order of the court it was made part of the record.

Notwithstanding the judgment of April 12, 1904, of the Circuit Court of the United States dismissing the action, the case remained on the docket of the state court, and before it was called for trial again the defendants therein (plaintiffs in error here) tendered an amended answer, setting out all the proceedings in the Circuit Court of the United States, attaching thereto copies of the judgments of that court, and alleging that they were in "force and effect unreversed," and pleaded "the same to plaintiff's recovery against them and each of them in said action." The court refused to let the answer be filed but ordered that it be made part of the record.

Mr. E. L. Worthington, with whom *Mr. W. H. Wadsworth* and *Mr. W. D. Cochran* were on the brief, for plaintiff in error:

The judgment of the United States court in this action was not void, even if the Federal court erred in taking jurisdiction, and if not void, then however erroneous it may have been, it was, until reversed, a bar to further proceedings, on the same cause of action, in the state court. *Dowell* v. *Applegate*, 152 U. S. 327; *Des Moines Navigation Co.* v. *Iowa Homestead Co.*, 123 U. S. 552; *Kern* v. *Huidekoper*, 103 U. S. 485; *Northern Pacific R. R. Co.* v. *McMullen*, 86 Wisconsin, 501.

A petition for removal and bond constitute the process by which a case is transferred from a state to a Federal court. *Kinney* v. *Columbia Savings & Loan Asso.*, 191 U. S. 78; *Ex parte Wisner*, 203 U. S. 449. A motion to remand is an objection to the sufficiency of the process. When a party comes into a Federal court and objects to the sufficiency of the process by which it was sought to bring him before the court, it is, in substance, a motion to quash the process. When a motion to quash a process is made and overruled, the question of the sufficiency of the process is *res judicata* between the parties.

Mr. Allan D. Cole, with whom *Mr. W. T. Cole* was on the brief, for defendant in error:

The judgment of the United States Circuit Court for the Eastern District of Kentucky, pleaded in bar herein, is a nullity. *Dexter, Horton & Co.* v. *Sayward*, 84 Fed. Rep. 299; *Amory* v. *Amory*, 95 U. S. 186; *Insurance Co.* v. *Pechner*, 95 U. S. 183; *Stone* v. *South Carolina*, 117 U. S. 430; *Carson* v. *Hyatt*, 118 U. S. 279; *Metcalf* v. *Watertown*, 128 U. S. 586; *Stevens* v. *Nichols*, 130 U. S. 230; *Crehore* v. *Railway Co.*, 131 U. S. 240; *Jackson* v. *Allen*, 132 U. S. 27; *Graves* v. *Corbin*, 132 U. S. 571.

Where it appears affirmatively by its own record that a court did not have jurisdiction of the cause, its judgment is not merely voidable but is an absolute nullity. *Dexter, Horton & Co.* v. *Sayward*, 84 Fed. Rep. 299; citing: *Galpin* v. *Page*, 18 Wall. 350; *Windsor* v. *McVeigh*, 93 U. S. 277; *Pennoyer* v. *Neff*, 95 U. S. 714; *Settlemeir* v. *Sullivan*, 97 U. S. 444; *In re Ayers*, 123 U. S. 443; *In re Sawyer*, 124 U. S. 200; *Hovey* v. *Elliott*, 167 U. S. 409.

Where a court has jurisdiction, it has a right to decide every question which occurs in the cause; and, whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court. But, if it acts without authority, its judgment and orders are not voidable, but simply void. They constitute no justification, and all persons concerned in executing such judgments or sentences are considered in law as trespassers. *Elliott* v. *Piersol*, 1 Pet. 328, 342. See also *Hickey* v. *Stewart*, 3 How. 750, 763; *Williamson* v. *Berry*, 8 How. 495–565; *Thompson* v. *Whitman*, 18 Wall. 457, 471; *In re Sawyer*, 124 U. S. 200, 225; *Guarantee Trust & Safe Deposit Co.* v. *Green Cove Springs & M. R. Co.*, 139 U. S. 137–151.

Mr. Justice Day, after making the foregoing statement, delivered the opinion of the court.

From the foregoing statement it is apparent that the princi-

pal question in this case, and it is the one which we regard as decisive of it, concerns the effect of the judgment rendered in the Circuit Court of the United States after it had taken jurisdiction, which was undertaken to be set up in the state court as a bar to further proceedings therein. It is contended by the defendant in error that when the Court of Appeals of Kentucky rendered its judgment holding that the case was not a removable one (March 5, 1902), that was a final judgment upon the question of jurisdiction, and the case should have been brought here for review and determination. But we are of opinion that this contention is not tenable. The case was three times in the Court of Appeals of Kentucky, and only the last judgment in that court was a final one. As we have seen, the state Circuit Court, in which the action was originally begun, held the case was a removable one, and from that order an appeal was prosecuted to the Court of Appeals of Kentucky, that court, concluding that both railroads could be properly joined in the action, held that the case was not removable, and remanded the same to the state court for further proceedings.

Upon the second appeal the judgment for the plaintiff below was reversed, and the cause remanded for a new trial. Upon the third trial a judgment was rendered in favor of the plaintiff below for damages, which was affirmed in the Court of Appeals of Kentucky, to which judgment this writ of error is prosecuted. Nor is it material that the state supreme court regarded itself as bound by the decision in the former appeal as the law of the case and declined in the judgment now under review to again consider the question. The judgment under review was the only final judgment in the appellate court of the State from which plaintiff in error could prosecute a writ of error, and until such final judgment the case could not have been brought here for review. *Schlosser* v. *Hemphill*, 198 U. S. 173, and cases therein cited.

The Circuit Court of the United States having taken jurisdiction of the case upon the removal, and having refused to remand it, and proceeded to final judgment, should the state

court, when that judgment was offered to be pleaded before it, have given effect to the judgment? That is the Federal question presented in this case. It is insisted for the defendant in error that the right of removal depends upon the presentation to the state court of a proper petition for removal, which petition should contain the essential allegations necessary to make out a case under the statute for that purpose, and that unless this is done the jurisdiction of the state court is not divested. And in aid of that contention cases are cited which hold that a plaintiff has the right to make a cause of action joint when acting in good faith, and when he has so made it, the action is deemed to be joint for the purpose of determining the right of removal. *Alabama Great Southern Railway Co.* v. *Thompson*, 200 U. S. 206; *Cincinnati, New Orleans & Texas Pacific Railway Co.* v. *Bohon*, 200 U. S. 221. And inasmuch as the state court has held that the Maysville and Big Sandy Railroad Company, under the law of Kentucky, could be properly joined as defendant with the Chesapeake and Ohio Railway Company in this case, it is insisted that the plaintiff had a right to sue both companies, and that the averment in the petition for removal, that the joinder was fraudulent, goes for nothing in the absence of a showing of facts which make such joinder fraudulent in fact. *Wecker* v. *National Enameling & Stamping Co.*, 204 U. S. 176.

It is insisted that this contention is supported by a line of cases in this court, which have held that a state court is not bound to surrender its jurisdiction until a petition for removal has been filed which upon its face shows that the petitioner has a right to the transfer of the cause. And it is contended that the petition in this case, in view of the decision of the Court of Appeals of Kentucky as to the right to prosecute a joint cause of action, did not make a case for removal, and, therefore, the state court did not lose its jurisdiction. To maintain the general proposition that a petition making a case for removal upon its face is essential to confer jurisdiction upon the United States Circuit Court attention is called to a number of cases decided in this court: *Stone* v. *South Carolina*, 117 U. S. 430; *Carson* v.

Hyatt & another, 118 U. S. 279; *Stevens* v. *Nichols*, 130 U. S. 230; *Crehore* v. *Ohio & Mississippi Railway Co.*, 131 U. S. 240; *Jackson* v. *Allen*, 132 U. S. 27; *Graves* v. *Corbin*, 132 U. S. 571.

In these cases the jurisdiction of the state courts was maintained for the want of an adequate petition showing facts which required an order of removal. In none of them was involved the effect of the judgment of a United States Circuit Court taking jurisdiction upon removal, unreversed and in full force and effect. That the Circuit Court of the United States may determine the question of the right of removal is conclusively shown by the terms of the statute governing the subject. In § 3 of the removal act (1 Comp. Stat. 510) it is provided that, a petition and bond being entered in the Circuit Court of the United States, the cause shall proceed in the same manner as if it had originally been commenced in the Circuit Court. And in § 5 of the act it is provided that the Circuit Court of the United States may at any time that it appears that it does not really and substantially involve a dispute or controversy properly within the jurisdiction of the Circuit Court, or that the parties to the suit have been improperly and collusively joined for the purpose of creating a case removable under the act, remand and dismiss the same as justice may require. Section 7 of the act of 1875 (1 Comp. Stat. 512) provides that a Circuit Court, in any case removable under the act, shall have power to issue a writ of certiorari to the state court, commanding that court to make return of the record in any cause removed as aforesaid, or in which any one or more of the plaintiffs or defendants have complied with the provisions of the act for the removal of the same, and enforce such writ according to law.

It is apparent that these provisions are intended to confer jurisdiction upon the United States Circuit Court to determine for itself the removability of a given cause, and it has been accordingly held in this court that, notwithstanding the refusal of the state court to remove the case, the party desiring the removal may file a transcript of the record in the Circuit Court of the United States, and if the case was a removable one it is

immaterial that the state court has denied the petition for removal. *Kern* v. *Huidekoper*, 103 U. S. 485, and cases therein cited. And it was held in *Traction Company* v. *Mining Co.*, 196 U. S. 239, that notwithstanding the refusal of the state court to make an order of removal, the controversy being removable to the United States Circuit Court, that court might protect its jurisdiction by injunction against further proceedings in the state court.

In view of these provisions of the statute and the decisions of this court construing the same we think it was the intention of Congress to confer upon the Circuit Court of the United States a right to determine the removability of a cause, independently of the jurisdiction and determination of the state courts. And while it is true that when the judgment of a state court is under consideration it may properly be held that the courts of the State are not obliged to surrender their jurisdiction until a petition is filed making a proper ground for removal, it does not follow that, when the jurisdiction of the Circuit Court of the United States is invoked, its judgment holding a case removable and rendering a final judgment therein, can be disregarded by the state court where it is properly set up before judgment, as was done in the present case. If this be not so, the state court may ignore an unreversed judgment of the United States Circuit Court deciding a question of Federal jurisdiction within the power conferred upon it by Congress, and wherein it was intended to give to the state court no right to review such action, and wherein the judgment is binding until properly reversed in this court, in which the question of jurisdiction can alone be finally settled, whether brought here from a state or Federal court.

The Circuit Court of the United States having an independent jurisdiction to determine the removability of the cause, what is the proper procedure when, as has sometimes happened, the Federal court differs from the state court upon this question? This question was dealt with in *Railroad Company* v. *Koontz*, 104 U. S. 5, 15, wherein Mr. Chief Justice Waite, speaking for the court, said:

"The right to remove is derived from a law of the United States, and whether a case is made for removal is a Federal question. If, after a case has been made, the state court forces the petitioning party to trial and judgment, and the highest court of the State sustains the judgment, he is entitled to his writ of error to this court if he saves the question on the record. If a reversal is had here on account of that error the case is sent back to the state court with instructions to recognize the removal, and proceed no further. Such was, in effect, the order in *Gordon* v. *Longest*, 16 Pet. 97. The petitioning party has the right to remain in the state court under protest, and rely on this form of remedy if he chooses, or he may enter the record in the Circuit Court and require the adverse party to litigate with him there, even while the state court is going on. This was actually done in the Removal Cases. When the suit is docketed in the Circuit Court, the adverse party may move to remand. If his motion is decided against him, he may save his point on the record, and after final judgment bring the case here for review, if the amount involved is sufficient for our jurisdiction. If, in such a case, we think his motion should have been granted, we reverse the judgment of the Circuit Court, and direct that the suit be sent back to the state court, to be proceeded with there as if no removal had been had. If the motion to remand is decided by the Circuit Court against the petitioning party, he can at once bring the case here by writ of error or appeal for a review of that decision, without regard to the amount in controversy. *Babbit* v. *Clark*, 103 U. S. 606. If, in such a case, we reverse the order of the Circuit Court to remand, our instructions to that court are, as in *Relfe* v. *Rundle*, 103 U. S. 222, to proceed according to law, as with a pending suit within its jurisdiction by removal."

So far as the case now before us is concerned it is immaterial that under the act of March 3, 1887, the decision of a Circuit Court of the United States remanding a case to the state court is final. *Missouri Pacific Railway Company* v. *Fitzgerald*, 160 U. S. 556.

Again, speaking for the court on the same subject, in *Burlington &c. Railway Co.* v. *Dunn*, 122 U. S. 513, 516, Mr. Chief Justice Waite said:

"But even though the state court should refuse to stop proceedings, the petitioning party may enter a copy of the record of that court, as it stood on the filing of his petition in the Circuit Court, and have the suit docketed there. If the Circuit Court errs in taking jurisdiction, the other side may bring the decision here for review, after final judgment or decree, if the value of the matter in dispute is sufficient in amount."

From these decisions it is apparent that, while the petitioner, in the event of an adverse decision, in the state court, may remain in that court, and after a final judgment therein bring the case here for review, he is not obliged to do so. He may file the record in the Circuit Court of the United States, as was said by Mr. Chief Justice Waite, while the case is going on in the state court. The Federal statute then gives to the United States Circuit Court jurisdiction to determine the question of removability, and it has the power, not given to the state court, to protect its jurisdiction, notwithstanding § 720 of the Revised Statutes, by an injunction against further proceedings in the state courts. *Traction Company* v. *Mining Company*, 196 U. S. 239.

In order to prevent unseemly conflict of jurisdiction it would seem that the state court in such cases should withhold its further exercise of jurisdiction until the decision of the Circuit Court of the United States is reviewed in this court. If the Federal jurisdiction is not sustained the case will be remanded with instructions that it be sent back to the state court as if no removal had been had. *Railroad Company* v. *Koontz*, *supra*.

Conceding that, except for the principle of comity, the state court may decide the question of jurisdiction for itself, in the absence of an injunction from the Federal court in aid of its own jurisdiction, or a writ of certiorari requiring the state court to surrender the record under the act of 1875, is the state court obliged to give effect to the judgment of the United States Cir-

cuit Court, from which no writ of error is taken, and rendered in the Federal court after it has sustained its own jurisdiction and refused to remand the action?

In view of the fact that the question is a Federal one, and that the state court is given no right to review or control the exercise of the jurisdiction of the Federal court, we think that such Federal judgment cannot be ignored in the state court as one absolutely void for want of jurisdiction, and that such judgment, until reversed by a proper proceeding in this court, is binding upon the parties, and must be given force when set up in the action. This view is sustained in the former decisions of this court upon the subject. In *Des Moines Navigation Company* v. *Iowa Homestead Company*, 123 U. S. 552, this court considered the effect of a judgment rendered in the Federal court upon removal from the state court. In that case it appeared that the Federal court ought not in fact to have taken jurisdiction, for it appeared upon the face of the record that some of the defendants who did not join in the petition for removal were citizens of the same State as the plaintiff. The state court of Iowa refused to give effect to the judgment of the Federal court, and its judgment was reversed. Mr. Chief Justice Waite, speaking for the court, said (123 U. S. 559):

"Whether in such a case the suit could be removed was a question for the Circuit Court to decide when it was called on to take jurisdiction. If it kept the case when it ought to have been remanded, or if it proceeded to adjudicate on matters in dispute between two citizens of Iowa, when it ought to have confined itself to those between the citizens of Iowa and the citizens of New York, its final decree in the suit could have been reversed, on appeal, as erroneous, but the decree would not have been a nullity. To determine whether the suit was removable in whole or in part or not, was certainly within the power of the Circuit Court. The decision of that question was the exercise and the rightful exercise of jurisdiction, no matter whether in favor of or against taking the cause. Whether its

decision was right, in this or any other respect, was to be finally determined by this court on appeal."

In *Dowell* v. *Applegate*, 152 U. S. 327, the benefit of a judgment in the Circuit Court of the United States was claimed. That judgment was the basis of a conveyance to the plaintiff in error, and it was contended that the conveyance was void, inasmuch as the Federal court had no jurisdiction of the suit in which the sale was ordered. It was held in this court that even if the Federal court erred in assuming or retaining jurisdiction of the suit, its decree being unmodified and unreversed, could not be treated as a nullity. After citing previous decisions of this court, the court, speaking through Mr. Justice Harlan, said (152 U. S. 340):

"These cases establish the doctrine that, although the presumption in every stage of a cause in a Circuit Court of the United States is that the court is without jurisdiction unless the contrary affirmatively appears from the record, *Börs* v. *Preston*, 111 U. S. 252, 255, and the authorities there cited, yet, if such jurisdiction does not so appear, the judgment or final decree cannot, for that reason, be collaterally attacked, or treated as a nullity.

"These authorities, above cited, it is said, do not meet the present case, because the ground on which, it is claimed, the Federal court assumed jurisdiction was insufficient in law to make this case one arising under the laws of the United States. But that was a question which the Circuit Court of the United States was competent to determine in the first instance. Its determination of it was the exercise of jurisdiction. Even if that court erred in entertaining jurisdiction, its determination of that matter was conclusive upon the parties before it, and could not be questioned by them, or either of them, collaterally, or otherwise than on writ of error or appeal to this court."

Applying these principles to the case at bar, we think the state court erred in refusing to give effect to the judgment set up in the answer offered in the state court. When the application for removal was made in the state Circuit Court that court

held the case removable, and the record was filed in the Federal court. Afterwards that court, upon the application of the plaintiff, refused to remand the suit, and proceeded to a final determination thereof, and rendered judgment accordingly.

It is not necessary to determine whether the case was removable or not. The Federal court was given jurisdiction to determine that question, it did determine it, and its judgment was conclusive upon the parties before it, until reversed by a proper proceeding in this court. Instead of bringing the case here the plaintiff proceeded in the state court, and that court denied effect to the Federal judgment. The plaintiff in error lost no right when thus compelled to remain in the state court, notwithstanding the Federal judgment in his favor, and brought the suit here by writ of error to the final judgment of the state court, denying his right secured by the Federal judgment. It was open to the plaintiff to bring the adverse decision of the Federal court on the question of jurisdiction to this court for review. This course was not pursued, but the action proceeded in the state court evidently upon the theory that the judgment of the Federal court was a nullity if it had erred in taking jurisdiction. For the reasons stated we think this hypothesis is not maintainable.

The judgment of the Court of Appeals of Kentucky is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

Dissenting: MR. JUSTICE MCKENNA.